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FEDERAL GOVERNMENT'S RELATIONSHIP WITH AMERICAN INDIANS

HEARINGS

BEFORE THE

SPECIAL COMMITTEE ON INVESTIGATIONS

OF THE

SELECT COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

FEDERAL GOVERNMENT'S PROTECTION OF WIND RIVER AND SAC AND FOX WATER RESOURCES

MAY 16, 1989
WASHINGTON, DC

PART 9

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FEDERAL GOVERNMENT'S PROTECTION OF WIND RIVER AND SAC AND FOX WATER RESOURCES

TUESDAY, MAY 16, 1989

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
SPECIAL COMMITTEE ON INVESTIGATIONS,
Washington, DC.

The special committee met, pursuant to notice, at 10:13 a.m., in room 628, Dirksen Senate Office Building, Hon. Dennis DeConcini (chairman of the special committee) presiding.

Present: Senators DeConcini, McCain, and Daschle.

Staff present: Kenneth Ballen, Michael Anderson, and Kathy Momot.

STATEMENT OF HON. DENNIS DeCONCINI, U.S. SENATOR FROM ARIZONA, CHAIRMAN, SPECIAL COMMITTEE ON INVESTIGATIONS OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

Senator DECONCINI. The Special Committee on Investigations will come to order. Senator McCain will be here shortly and has authorized me to proceed.

Today the special committee examines the Federal Government's management of water on Indian lands. Maintaining quality drinking water is of vital concern to all tribal governments. Maintaining high quality commercial and recreational fishing areas is also important to many Indian tribes. Some Indian tribes also place important religious values on the fish on their particular lands. Today's testimony is a continuation of earlier testimony from present chairman John Washakie of the Shoshone Indian Tribe.

Last February, Chairman Washakie testified that the Federal Government's management of water at the Wind River Reservation in Wyoming had damaged the tribe's fisheries. Since that time the committee has investigated the fishery situation at Wind River. In our investigation, we focused on three questions: (1) whether the tribe's fisheries are being protected by the Federal Government; (2) whether agencies in the Federal Government coordinate their management on water on Indian lands; and (3) whether there are areas in which the Federal Government can improve its fisheries management on Indian land. The testimony of the various tribal and Federal Government witnesses this morning will provide a number of different views on the issue. This testimony is expected to give the committee valuable guidance in our efforts to make recommendations.

Our first witness today will be Richard Baldes, fishery biologist with the U.S. Fish and Wildlife Service. Mr. Baldes, would you come forward, please, and raise your right hand.

[Witness sworn.]

Mr. Anderson will conduct the questioning.

STATEMENT OF RICHARD BALDES, PROJECT LEADER AT LANDER, WYOMING FISH AND WILDLIFE MANAGEMENT OFFICE OF THE U.S. FISH AND WILDLIFE SERVICE

Mr. ANDERSON. Would you please state your name for the record?

Mr. BALDES. Richard Baldes.

Mr. ANDERSON. And where are you employed?

Mr. BALDES. I'm employed with U.S. Fish and Wildlife Service at Lander, Wyoming.

Mr. ANDERSON. And what is your title and position there?

Mr. BALDES. My title is Project Leader.

Mr. ANDERSON. How long have you been employed by the Fish and Wildlife Service?

Mr. BALDES. For 18 years.

Mr. ANDERSON. Could you give the committee a brief description of your educational background?

Mr. BALDES. I have a Bachelor of Science in Wildlife Management from the University of Wyoming and a Master of Science degree in Fisheries from Colorado State University.

Mr. ANDERSON. Mr. Blades, could you please give the committee a brief description of what your current activities are for the U.S. Fish and Wildlife Service?

Mr. BALDES. I am Project Leader at the Lander Fish and Wildlife Management Assistance Office. We have primary responsibility for both fish and wildlife management on the Wind River Indian Reservation. We also have responsibilities in fisheries at two wildlife refuegees—National Elk Refugee and Sea Skitty Wildlife Refugee on Wind River.

Mr. ANDERSON. Thank you. Could you also describe any special projects the Fish and Wildlife Service at Lander has taken on in recent years?

Mr. BALDES. Yes; one of the things that we're very proud of at Lander is that we received the "Take Pride in America" award in 1988 for our efforts in transplanting antelope to historical habitat on the reservation. This was a cooperative effort between a number of agencies and was one of the top five awards in the U.S. Fish and Wildlife Service in 1987.

Mr. ANDERSON. Did you come to Washington to attend the awards ceremony?

Mr. BALDES. Yes; I did.

Mr. ANDERSON. And where was that, sir?

Mr. BALDES. That was at the White House last year.

Mr. ANDERSON. Briefly, what type of an award was that for the Department of the Interior? Was that considered a prestigious award?

Mr. BALDES. Very much so. We were very fortunate at Lander to be a part of that because many of stations throughout the country

have people that handle those kinds of things, we certainly don't, we're just a small station in the field, so we were very honored by that.

Mr. ANDERSON. In 1988, you also received the Wyoming Wildlife Federation Award as Wyoming Wildlife Conservationists of the Year, is that right?

Mr. BALDES. Yes.

Mr. ANDERSON. Mr. Baldes, do yu feel qualified to discuss fish and wildlife management issues at the Wind River Indian Reservation in your capacity as a biologist for the Fish and Wildlife Service?

Mr. BALDES. Yes.

Mr. ANDERSON. Based on that experience, would you say the reservation is an area of great natural beauty and unique in terms of its variety of fish species?

Mr. BALDES. Yes. We feel that Wind River is one of the last jewels left in the United States. Unlike lots of areas throughout the country, it has been somewhat protected over the years, although the resources there are being discovered. We deal with many native species but we also have the fresh water burbot that is of very high concern.

Mr. ANDERSON. Sir, is that also known at a ling fish?

Mr. BALDES. Ling, yes. We also have cutthroat trout, white fish, and other species of trout. We also have most of the big game animals that you find throughout the country, including big horn sheep, elk, and moose.

Mr. ANDERSON. What types of rivers and lakes and how many in number would you say are at the Wind River Indian Reservation?

Mr. BALDES. We have some of the most pristine back country left in the United States and that's partly because the Shoshone and Arapaho tribes in 1938 set aside a wilderness area—that, by the way, was the first Indian tribe in this country to do such a thing—but we have 265 lakes in the back country, very high quality fish and wildlife habitat, and there are over 1,100 miles of rivers and streams, most high quality trout streams.

Mr. ANDERSON. Do the Bureau of Reclamation and the BIA manage water projects at the reservation?

Mr. BALDES. Yes.

Mr. ANDERSON. What projects would BIA and the Bureau of Reclamation manage there?

Mr. BALDES. The Bureau of Reclamation primarily is responsible for managing water in the Wind River system in conjunction with the Midvale Irrigation District.

Mr. ANDERSON. What specific areas of water would they manage?

Mr. BALDES. They manage Bull Lake, Bull Lake Creek, Diversion Dam, and Wyoming Canal.

Mr. ANDERSON. What would BIA manage?

Mr. BALDES. BIA manages some canals on the Wind River system—Dinwiddy, Johnstown, and Lefthand Canals; and on the Little Wind River system—Washakie Reservoir, Ray Lake, Ray Canal, Subagency Canal, and Coolidge Canal.

Mr. ANDERSON. Based on your experience on the reservation the last 16 years, would you say that the Federal Government has fully protected the water resources at Wind River?

Mr. BALDES. As it relates to fisheries and the impact on fisheries, I would say they have not.

Mr. ANDERSON. In fact, could that be characterized as mismanagement?

Mr. BALDES. In terms of fisheries, yes. I would characterize it that way, yes.

Mr. ANDERSON. That would be characterized as mismanagement by the Bureau of Reclamation and the Bureau of Indian Affairs?

Mr. BALDES. Yes.

Mr. ANDERSON. Let's start with the Bureau of Reclamation, where in your view would they have mismanaged?

Mr. BALDES. The number one problem that we've had with the Bureau of Reclamation for a lot of years is how they manipulate water in Bull Lake. They've not maintained a minimum pool there.

Mr. ANDERSON. What is a minimum pool?

Mr. BALDES. A minimum pool is a level of water in a reservoir that must be maintained. From a fisheries standpoint, it means the difference between having an excellent fishery or a very poor one. If you dramatically fluctuate water levels in reservoirs you may lose most of the spawning habitat in some years.

Mr. ANDERSON. Have you recommended a minimum pool to the Bureau of Reclamation?

Mr. BALDES. Yes.

Mr. ANDERSON. And have they adopted your recommendations?

Mr. BALDES. They have not.

Mr. ANDERSON. What has been the impact on fish due to the lack of a minimum pool? And, sir, before you explain, if you could also refer to these charts here of Bull Lake, that would be helpful.

Mr. BALDES. I think one of the best ways to explain minimum pool is—and if you look at the schematic on the left, the figures are in acre feet, and the line at the top of the reservoir is what Bull Lake is at capacity, which is a little over 152,000 acre feet, that's maximum pool storage. The next line that you see down from that is 127,000 acre feet, that's what we recommended to the Bureau of Reclamation as a minimum pool for Bull Lake. The reason we recommended that is because at that level we lose considerable spawning habitat for both ling and lake trout.

Mr. ANDERSON. What other impacts on fish would result from that level?

Mr. BALDES. Again, primarily spawning of lake trout and spawning of ling. The other thing is when the levels are drawn down to such levels as they were last year, it does not allow for fish to move upstream to spawn.

Mr. ANDERSON. And did you also have to postpone some planning at Bull Lake last year?

Mr. BALDES. Yes, sir; we recommended to the tribes, and they did accept the recommendation, that the fishing be closed. We had 100,000 kamloop and rainbow trout that we had intended to stock in Bull Lake, those are fish that we requested three years previous, and we were unable to stock those fish and that was about $35,000 worth of fish.

Mr. ANDERSON. Is there also trophy-type fish in this area?

Mr. BALDES. That's another thing that we're very concerned about at Bull Lake. In past history, Bull Lake was the best trophy

fishery for ling. It is also a trophy fishery for lake trout. However, in the last few years, that's been impacted dramatically.

Mr. ANDERSON. Could you also describe what you mean by trophy-type fish.

Mr. BALDES. Trophy fish in the case of ling are fish that are 10 to 17 pound class. Trophy lake trout are fish in the 10 to over 30 pound class.

Mr. ANDERSON. In prior testimony before this committee in deposition, a Bureau of Reclamation official stated that they had not received any clear recommendations from the Fish and Wildlife Service on what the minimum pool should be. Do you have a view on that?

Mr. BALDES. Yes, I do. They do have clear recommendation from the Fish and Wildlife Service, as that schematic shows, and we provided that information to them several years ago, and that is 127,000-acre feet as our recommendation for a minimum pool in Bull Lake.

Mr. ANDERSON. The impact on the fish you described, does this also effect the revenue of the tribes?

Mr. BALDES. Absolutely. Last year we had to recommend to the tribes that the fishing be closed early, which they did, ice fishing was closed. This year Bull Lake has not been opened to fishing. If the level doesn't come up substantially, there will be no fishing at Bull Lake this year.

Mr. ANDERSON. Would you say that the Bureau of Reclamation has done all that they could legally do in this matter to protect the fish at Bull Lake?

Mr. BALDES. No.

Mr. ANDERSON. And why not?

Mr. BALDES. Again, we feel that because of their trust responsibility they are obligated to protect fisheries as well as the water needs for irrigation.

Mr. ANDERSON. Are there any other areas that the committee should be aware of in terms of what you might characterizes as mismanagement by the Bureau of Reclamation?

Mr. BALDES. Yes; we're very concerned with the flows that are managed by the Bureau of Reclamation Midvale Irrigation District from Bull Lake via Bull Lake Creek to the Wind River.

Mr. ANDERSON. Where is Bull Lake Creek? If you would refer to a chart there, that would be helpful.

Mr. BALDES. I think as you can see Bull Lake Creek is pointed out on this schematic, just below Bull Lake, it flows to the north into the Wild River. We're concerned because we don't have instream flows in Bull Lake Creek.

Mr. ANDERSON. And why is it necessary to have instream flows and at what levels do you need these instream flows?

Mr. BALDES. In order to have the best fishery possible, you need instream flows for fish. There are various flows depending on the stream that you need to have those types of fisheries.

Mr. ANDERSON. Any other problems with the water at Bull Lake Creek and management by the Government there?

Mr. BALDES. Yes. Over the years, we've been concerned about large fluctations at Bull Lake Creek. At times it may be 1,000 or 2,000 CFS and a day or two later it may be 200 or 300 CFS or less.

Mr. ANDERSON. Could you explain what a CFS is and what kind of effect that has?

Mr. BALDES. Yes, excuse me. CFS is cubic feet per second, it is a measurement of flow. In this particular case, a large flow would be 2,000 CFS and low flow would be 10 CFS.

Mr. ANDERSON. Is there any way to control that and, in your view, has it been controlled effectively at Bull Lake Creek?

Mr. BALDES. There is a way to control and in my view, in terms of fisheries and the impact on fisheries, it has not been controlled adequately.

Mr. ANDERSON. Any idea as to why it is inadequate and why it hasn't been controlled properly?

Mr. BALDES. Yes. The Bureau of Reclamation and Midvale feel that the water in Bull Lake is for irrigation and irrigation only and they manipulate the water for that use.

Mr. ANDERSON. What other areas would you characterize as mismanagement by the Bureau of Reclamation?

Mr. BALDES. I didn't want to miss this one point that relates to fluctuations. For example, brown trout spawn usually the second week of November in Bull Lake Creek. There are oftentimes when the stream may be 30 or 35 CFS. If they drop the level below that within the next 120 days or so, maybe a little more, we already have a minimal spawning habitat at that time and if they drop those levels, those eggs and young fish that are in the gravels will die. That happens and has happened very often.

Mr. ANDERSON. When has that happened and what's the impact of that type of drop?

Mr. BALDES. In some cases it could completely eliminate a year class of fish.

Mr. ANDERSON. Would that be hundreds of thousands of fish?

Mr. BALDES. Thousands and thousands of fish.

Mr. ANDERSON. What other areas would you characterize as mismanagement?

Mr. BALDES. Probably our third biggest area of concern with the way that water is manipulated by the Bureau of Reclamation and Midvale is at Diversion Dam. Diversion Dam is depicted on the schematic——

Mr. ANDERSON. Who operates Diversion Dam?

Mr. BALDES. The Bureau of Reclamation and Midvale Irrigation District.

Mr. ANDERSON. What is the Midvale Irrigation District?

Mr. BALDES. Midvale Irrigation District is a private irrigation district. The Bureau of Reclamation and Midvale divert all of their water from the Wind River system into the Wyoming Canal at Diversion Dam. What we're concerned about are two main things: First, most of the Wind River is diverted at any time into their canal at Diversion Dam. That results in dewatering of the Wind River below Diversion Dam. The other point that I want to make is they sluice or flush the silt that deposits above the Dam once to twice a week. Last year they flushed the system 20 times within the irrigation season.

Mr. ANDERSON. Could you explain what this sluicing or flushing operation is in simpler terms?

Mr. BALDES. Yes. It is sediment or silt, fine sand, that's flushed out of the system because they want to keep as much of that out of their canals as possible so they periodically take that silt and ship it down the Wind River. That causes problems for fish reproducing——

Mr. ANDERSON. Why does that cause problems for fish reproducing?

Mr. BALDES. Because it deposits in the gravels where fish spawn and also covers food sources in the River.

Mr. ANDERSON. In other words, it smothers the fish when the silt comes down?

Mr. BALDES. Yes. If eggs are deposited, there is no way they can survive.

Mr. ANDERSON. Is sluicing or flushing of the water necessary to the operation of the Dam?

Mr. BALDES. Yes, it is in the Bureau of Reclamations' eyes, yes.

Mr. ANDERSON. So it is unavoidable then, isn't it?

Mr. BALDES. Yes.

Mr. ANDERSON. What's your complaint then if it's an unavoidable action.

Mr. BALDES. In terms of impacts on fisheries, we think it is unavoidable. We feel that the silt shouldn't be flushed down the system.

Mr. ANDERSON. If there were improvements, would that help the fish in the area?

Mr. BALDES. Absolutely.

Mr. ANDERSON. What areas for improvement could you recommend to the committee that we could evaluate in terms of general practices that Government agencies that manage water could undertake?

Mr. BALDES. They need to look at the source of the problem. We feel that the source of the problem may have been aggravated by a change in the river they made several years ago. They put in a dike and diverted the river to the south and when they did that, there is not protection for the banks and it continuously erodes the stream bank and so their sediment load is greater.

Mr. ANDERSON. To understand here, what would be worse, dewatering of a river or this sluicing operation that you've described?

Mr. BALDES. It would be difficult for me to say which is worse, but between the two it is quite obvious that it has had a devastating effect on the river below Diversion Dam.

Mr. ANDERSON. Senator DeConcini started out with the question of whether the Federal Government is fully protecting the tribal fisheries in this area. What would your answer to that question be?

Mr. BALDES. They are not.

Mr. ANDERSON. And what would your answer be to the question of whether the Federal agencies here are coordinating their management of Wind River?

Mr. BALDES. They are not.

Mr. ANDERSON. Do you feel there are areas in which the Federal Government can improve here as well?

Mr. BALDES. Absolutely.

Mr. ANDERSON. Mr. Baldes, you also mention that the BIA has a role here in terms of managing water. Are there instances that you could characterize as mismanagement by the BIA?

Mr. BALDES. Yes, the BIA is responsible for irrigation diversion on the South and North Forks of the Little Wind River and some portions of the Wind River. They are also responsible for diversion of water out of Lower Dinwiddy Lake, Washakie Reservoir, and Ray Lake. There are several problems that exist with the Bureau of Indian Affairs water manipulation, but the main one is that the Bureau of Indian Affairs has never recorded or measured water. Therefore, if we wanted to figure out, for example, instream flow needs in the Little Wind River, there is no way for us to determine how much water should be left or is available for fish in the Little River because we have no way of calculating the amount of water they need for irrigation.

Mr. ANDERSON. What other problems, briefly could you describe in terms of BIA's management of the water at Wind River?

Mr. BALDES. Even though we've recommended instream flows—and I can't blame this all on the Bureau of Indian Affairs, either, because of the litigation that is going on in the court case on water issues—they have not recognized our instream flows. There have been some legal problems but I think that in spite of that we should be able to work out some instream flow needs and they should honor those.

Mr. ANDERSON. Mr. Baldes, you have some slides you brought to demonstrate some of these problems you've characterized as mismanagement, is that right.

Mr. BALDES. Yes.

Mr. ANDERSON. Could you describe for the committee some of the problems through your slides of these problems. Until we get the lights down, why don't you describe generally what we're going to be looking at here in terms of your slides?

Mr. BALDES. We're going to see some of the levels of Bull Lake and some of the good things that we have on the Wind River Indian Reservation, but primarily the problems that effect these valuable fisheries.

Mr. ANDERSON. You mentioned that there were problems with BIA's water manipulation earlier. Could you describe further what you mean by that statement?

Mr. BALDES. Again, I don't blame all of this on the Bureau of Indian Affairs, I blame part of this on the Army Corps of Engineer's lack of enforcement, but at times the Bureau of Indian Affairs is required to do stream improvement or some type of work in their diversion into streams. At times, they use materials to protect stream banks. Often times they use materials that are not conducive to adequate protection—they might use fine sediments or the way they do the work will cause more damage to the stream and at times not even protect the stream.

Mr. ANDERSON. By way of background, have you told the Bureau of Reclamation and the BIA about your concerns from your position in the Fish and Wildlife Service and if so, what has their response been?

Mr. BALDES. In terms of the Bureau of Reclamation, their response is that they can use the water for irrigation and that is

what it was for. In the past, they wouldn't consider fisheries at all but in the last few years they have made a few concessions, not very many. The Bureau of Indian Affairs, on the other hand, again, a lot of it is the lack of data, but the Bureau of Indian Affairs needs to look closer at instream flow recommendations and also minimum pools in the reservoirs that they use for storage.

Mr. ANDERSON. I don't want to put words in your mouth, but you're saying that recently there has been improvement but there are areas of further improvement that could—

Mr. BALDES. Oh, absolutely.

Mr. ANDERSON. Okay.

Mr. BALLEN. Mr. Baldes, I understand your position, as being part of the Fish and Wildlife Service, is the Bureau of Reclamation and secondarily the BIA have not lived up to their trust responsibility to make sure that the fish are not dying at the Wind River Reservation by the diversion of the water, is that correct?

Mr. BALDES. That's correct, Mr. Ballen.

Senator DeConcini. Would you just comment on what you think the Bureau should do? Is it a matter of resources on its part or inability to want to address these types of problems? What's your feeling of what they ought to do to correct this?

Mr. BALDES. I think that they need to recognize that there are other uses of the water besides irrigation.

Senator DECONCINI. They are so geared toward irrigation that they just forget any other uses and that is where the trust responsibility would come in?

Mr. BALDES. Yes, Senator. They've done a very good job of irrigation. We feel if they considered fisheries and did a good job there, we'd probably both be satisfied.

Mr. ANDERSON. All right, Mr. Baldes, if you could describe the first slide, please?

Mr. BALDES. This is Bull Lake at about 145,000 acre feet. As I mentioned earlier, when it is at capacity it is a littler over 152,000 acre feet. The reservoir is about 8 miles in length and a little over 3,000 surface acres, and 100-plus feet deep when full. It used to have trophy ling and it still has some trophy lake trout, but those are disappearing fast with the losses of habitat spawning.

Mr. ANDERSON. Next slide, please.

Senator DECONCINI. Is that lake used for recreation?

Mr. BALDES. Yes; it is, Senator. It is a very popular spot. As a matter of fact, as I mentioned earlier, it could be one of the best reservoirs in the State of Wyoming.

These are ling cod, fresh water burbot, whatever you want to call them, and these are trophy fish—there's one of them that's about 15 pounds and another one about 12 pounds. This slide was taken in 1975 and this was just toward the tail end of the trophy fish season. It was not unusual for tribal members and non-Indian fishermen during the ice fishing season to catch several of these fish during the winter.

This is Bull Lake Creek below Bull Lake Reservoir. This is a flow of 262 CFS. This is a very good flow for Bull Lake. If we saw something like this in Bull Lake most of the time, we'd be tickled to death.

The lights are not doing this slide justice, you need to be able to see this so that you can see how——

Mr. ANDERSON. Let me interrupt the slide presentation just for a moment. Can you describe any activities that have occurred at the reservation since the special committee began its investigation of this issue?

Mr. BALDES. Yes; there have been a number of things. Several months ago we felt that, because there was so much animosity and ill-feeling between the Fish and Wildlife Service, and the Bureau of Reclamation—we've been battling this for 15 years so there is no love lost, I probably shouldn't say this, but there is no love lost between the agencies. Recently the Fish and Wildlife Service, asked for biological input from the Bureau of Reclamation. They didn't believe us so we asked them to get their own biologists down here and look at the data and look at Bull Lake and the problems that are occurring here. Initially, they weren't willing to do that but I've been called by their biologists twice since the investigative committee became involved.

Mr. ANDERSON. Has the biologist visited the area?

Mr. BALDES. No; he has not.

Mr. ANDERSON. But you expect that someone will be there to see those problems?

Mr. BALDES. Yes; I think so. We didn't feel that we actually needed to do that, we have a good biologist at Lander and we have a good biologist in the Fish and Wildlife Service research unit at Colorado State who has done some studies there. But we felt that this was maybe another approach for them to be able to have someone within their own agency who would look at the data.

Mr. ANDERSON. Did they trust the data that you were providing to them?

Mr. BALDES. No; as a matter of fact, on the instream flows, we had to do the instream flow study over again. I have to admit though that the Fish and Wildlife Service said, fine, let's do it, because we were a little bit reluctant to use some of the minimum flows that we had done. But we had the Wyoming Game and Fish Department come in and do the study on instream flows for us. We have the capability of doing that, however, we felt that because it was the Fish and Wildlife Service at Lander doing it, it would be better to get an outside agency.

Mr. ANDERSON. What other activities have occurred in the last couple of months?

Mr. BALDES. There has been a meeting held between the Bureau of Reclamation, BIA, and Fish and Wildlife Service in Billings.

Mr. ANDERSON. Is that to address some of the concerns that you're bringing forward today?

Mr. BALDES. Yes, As a matter of fact, I saw some correspondence this morning that is a public document now by Dale Hall—Excuse me, Senator, I meant to introduce Dale Hall, who is Assistant Deputy Director with the Fish and Wildlife Service in Washington, D.C., and who supports my being here.

Senator DECONCINI. Thank you, Mr. Hall. We're grateful for the support that you've offered here.

Mr. BALDES. That was an oversight on my part. I'm sorry.

Mr. ANDERSON. All right, Mr. Baldes, I believe we're ready to continue the slide presentation, so if you would please proceed.

Mr. BALDES. Remember the slide that we showed earlier of Bull Lake when it was close to capacity. This is 1985, when it was about 35,000 acre feet. I meant to point out, there is a peninsula of land that comes out in the middle of the picture, if you didn't notice that on the other one, and it gives you an idea of how low this reservoir is brought down. See that point of land, Senator?

Senator DECONCINI. Okay. Thank you.

Mr. BALDES. This is Bull Lake Creek at 262 CFS with a good flow. This is the kind of flow that we would like to see most of the time.

This depicts what the reservoir looks like at fairly low draw down. Last year they drew it down even lower than this, to below 26,000 acre feet.

Senator DECONCINI. What period of time?

Mr. BALDES. This was at the end of the irrigation season. It is about 31,000 or 32,000 acre feet today, so it hasn't come up very much, Senator. The point that we're trying to make, see the land that's barren on the side of the reservoir? That's where all the spawning habitat is and within 21 feet of draw down, 50 percent of the ling spawning habitat and 30 percent of the lake trout spawning habitat is gone.

Senator DECONCINI. It is your opinion that better management could accommodate both of these objectives, is that correct?

Mr. BALDES. Not in all years, but in some year, yes. Because they've been able to keep Bull Lake level up to our recommended minimum pool at times before we became involved.

This slide is at the dam looking the other direction and it shows the spawning habitat. The rocks and the gravel that you see on the right hand side of the slide, the area the fish need to spawn and that's where the young fish have to be. Anything below that is silt covered, silt laden, and no cover for fish. That's also poor food producing areas below those rocks.

This was put in for purposes of showing the dike. The Bureau of Reclamation and Midvale has to do some work on the spillway. They put in a dirt dike, as you can see to the right of the picture. They had intended to let the water come over the spillway and just take that material downstream. They did not have a 404 permit, this was at the time they needed a 404 permit, they did not apply for one, the Army Corps of Engineers issued them a cease and desist order and they had to remove that dike. But I think this exemplifies the thinking of those people over the years and how much they pay attention to the affects of the way they manage water and do things there. That would have been tremendously devastating to that stream had they done that.

These are some of the concerns. I know that the Bureau of Reclamation people who are here are going to say there goes that slide again, and this was taken back in 1977, but I'm using it because it still has happened in the last few years and U.S. Geological Survey records will bear me out. It hasn't happened to the consistency that it did in 1977 and prior years, but this is Bull Lake Creek—the one we showed you earlier with 262 CFS—there only about 1.3 CFS in this stream in this slide.

This is what happens to fish when they fluctuate water too much or do like they just did in the previous slide where there is very little water. It strands fish in pools, their temperature rises, and the end result is death. When this picture was taken, there were thousands of fish dead in this stream. This was happening year after year. Now, I have to say that they have improved. But spawning, and where you don't see eggs, and small fish dying in the rocks because of fluctuations is of more concern now than the more obvious that was happening before.

This is the Wind River and Diversion Dam. The Wind River flows from the left to the right. You see Wyoming Canal at the top. This looks good. This looks really excellent here. But it is at this particular point—this slide was taken several years ago so the River is a lot wider today, that we're concerned about flows, dewatering, and the flushing of the Reservoir that occurs here.

I would like you to pay particular note here. This is a good flow of the Wind River below Diversion Dam. Take note that this is a clear stream. On this particular day turbidity measurements were being taken by EPA and the measurements were 12 nephelometric turbidity units. You don't need to remember that, that's just a measure of turbidity, the amount of sediment in the water.

This is what happens to the River when they flush. As you can see, there's a tremendous amount of mud and dirt and silt. They raise the turbidity units from 12 to 41,000. This silt is carried for 60 miles, all the way to Boysen and you can see it that far.

Can't leave BIA out. The Bureau of Indian Affairs car bodies at Left Hand Canal on the Wind River. These are now illegal to use as rip-rap.

Those are all of the car bodies slides.

Senator McCAIN. When were those car bodies put there?

Mr. BALDES. Those were put in before the law went into effect, Senator.

Senator McCAIN. Did you have anything to say in the process of deciding to put those car bodies in there?

Mr. BALDES. Not until later.

Senator McCAIN. After they were in?

Mr. BALDES. Yes, we feel they should pull them out and use proper material, large rock.

Senator McCAIN. You were not notified that they were going in?

Mr. BALDES. No; this was some time ago, Senator. I don't feel I can really point the finger at the Bureau of Indian Affairs in this particular instance. It is just that these are still in the river and that's what I'm wanting to point out, sir.

Senator McCAIN. It looks terrible.

Mr. BALDES. Absolutely.

Mr. ANDERSON. Is that dangerous in any way to people or to the fish and Wildlife Service, in particular?

Mr. BALDES. It is very dangerous to people in terms of swimming hazards. They are particularly dangerous to the Fish and Wildlife Service because we do fish population studies in the river and we use large rubber rafts and we use electrical current, if you're familiar with how we electrofish, and so it is very dangerous to us.

Mr. ANDERSON. In other words, you could be electrocuted by some of these car bodies.

Mr. BALDES. Yes; we could.

Mr. ANDERSON. Thank you.

Mr. BALDES. This slide shows car bodies. At one time, this whole bank was rip-rap from there you can see in the foreground all the way around, there were about 250 cars in there.

Mr. ANDERSON. Mr. Baldes, let me interrupt. By rip-rapping you mean the cars would stabilize the banks of the right, is that right?

Mr. BALDES. Yes, Mr. Anderson; as you can see, if you don't do a proper job, and that's why they are illegal now, they wash downstream and not only cause hazardous conditions to people but they cause erosion in areas that you don't need it.

Mr. ANDERSON. Have these cars been removed from the river?

Mr. BALDES. No, they have not. I am not pointing the finger at the Bureau of Indian Affairs in this particular instance. This is a private individual.

Mr. ANDERSON. All right. Thank you, Mr. Baldes.

Senator DECONCINI. Thank you, Mr. Baldes. Senator McCain, do you have any questions?

Senator MCCAIN. No further questions.

Senator DECONCINI. Thank you again, Mr. Baldes.

Mr. BALDES. Thank you.

[Prepared statement of Mr. Baldes appears in appendix.]

Senator MCCAIN. Our next panel will be John Washakie, Chairman of the Shoshone and Arapaho Joint Business Council; Starr Weed, Shoshone tribal member and religious spokesman; and Kevin Gover, attorney for the Shoshone Tribe. Would you come forward, please, and be sworn.

[Witnesses sworn.]

Mr. Anderson will conduct the questioning.

STATEMENT OF JOHN WASHAKIE, CHAIRMAN, SHOSHONE AND ARAPAHO JOINT BUSINESS COUNCIL; STARR WEED, SHOSHONE TRIBAL MEMBER AND RELIGIOUS SPOKESMAN; AND KEVIN GOVER, ATTORNEY, SHOSHONE TRIBE, STETSON, WILLIAMS & WEST

Mr. ANDERSON. Chairman Washakie, you've previously testified before this committee, is that correct?

Chairman WASHAKIE. That is correct.

Mr. ANDERSON. And those were on three issues; the fish and game code, the underground injection control program by EPA, and also Bull Lake, is that right?

Chairman WASHAKIE. That is correct.

Mr. ANDERSON. Have there been any developments in those areas since your last testimony?

Chairman WASHAKIE. Yes; there has. I would like to thank the committee first for holding these hearings and say that our experience has been most beneficial. The examples are the UIC program, we were experiencing some difficulty in getting hold of some documents and maps to actually determine some of the problems that we're having at Wind River and since the hearing we have been provided with that information.

On the issue of the game code problem that we were experiencing with the way it had been let through a 638 contract and the

numerous issues that arose due to the tribe's implementation of a game code, we had not been given the funds to actually perform the game code enforcement as well as management. Since then we have received those funds. There had been an eight month lapse in time between the time we entered into the contract until the time that we actually received the funds. So that has been a very positive result.

Among other issues that we have found very beneficial is the BIA investment program. We're getting some good responses from that and we're starting to understand the investment contract.

We came to Washington 3 years ago and made a slide presentation similar to the one you've seen this morning to the Fish and Wildlife Service, the Bureau of Reclamation, and to the senators and congressmen from the State of Wyoming. At that time, we really didn't get any responses. But since we brought this issue to this committee, we're getting some very positive responses and we certainly appreciate that. I think the committee should be commended for that.

Mr. ANDERSON. Thank you for your comments. On to Bull Lake and Bull Lake Creek, Mr. Baldes testified that there has been some impact on the tribe's revenues due to this alleged mismanagement. Could you explain what type of impact that would be to the tribe?

Chairman WASHAKIE. We have a potential loss of revenue of $50,000 to $60,000. We had to close Bull Lake last year due to the lake level. In our concern to maintain mature fish in there for reproduction and the loss of reproduction habitats, we decided to close it. Bull Lake is a big drawing area and it is still closed today to selling of licenses to the public. Its access, its trophy-size fish, and the species available are probably the biggest draw that we have. We have a lot of people who buy our permit solely to fish Bull Lake. We've gone out over the years and done some assessment on that to determine which was their favorite fishing areas, and Bull Lake is our number one drawing card.

Mr. ANDERSON. Has there been any lack of communication between the Federal agencies and the tribe concerning Bull Lake and Bull Lake Creek?

Chairman WASHAKIE. Yes, there has been. The instream flows for Bull Lake Creek have always been an issue and at times the minimum Lake levels have been an issue. We have consistently relied on our fishery experts, meaning the U.S. Fish and Wildlife Service, to advise us and we would receive advice from them as to what we should do and we would then make our inquires to the appropriate agency, the Bureau of Reclamation or the Bureau of Indian Affairs, but those inquiries basically fell on deaf ears.

Mr. ANDERSON. Are there any other examples of lack of communication that had any consequences for the tribe? Specifically, you mentioned an incident last fall.

Chairman WASHAKIE. Yes; last September at the end of the irrigation season, Bull Lake had been drawn down to a level lower than the 34,000 acre feet that you saw in the slide. Our concern was twofold: first, we wanted to maintain a lake level that would allow for reproduction of our fish. The way that they were doing it was by drawing it down at the end of an irrigating season. Our best information tells us that we are in a drought period at Wind River

Reservation. To release that water at the end of the irrigating season resulted not only in a loss of spawning habitat and recreational use but also in the loss of stored water. At that time, Mr. Collins, who was the Chairman of the Arapaho Council, and I had a discussion and we took the action to deny access to the Bureau of Reclamation in order to bring them to the table. This has been an on-going problem for longer than I've been on the Council and this is my ninth year. We took that action to deny them access so that we could get them to respond to some of the issues.

Mr. ANDERSON. Do you feel it was a drastic action denying the Bureau of Reclamation access to their own dam?

Chairman WASHAKIE. I think it was a needed action. I think it was one that should have been taken much earlier. We've had millions and millions of dollars of loss due to the manipulation of water in Bull Lake and it had reached a point where we said we're not going to take it anymore.

Mr. ANDERSON. Thank you, Chairman Washakie.

Mr. Weed, could you please state your name and your background?

Mr. WEED. My name is Starr Weed, one of the religious leaders of Wind River.

Mr. ANDERSON. Sir, could you tell the committee what religious significance the ling fish has to the Shoshone people?

Mr. WEED. We call it Thirst Dance in our language, in which we fast and thirst for three days and nights. They call it Sun Dance now. The old timers, before they went in, they ate fish because it came from water and they were going to thirst and that would help them through their three days of fasting and dancing. Also, they took peppermint that is along the rivers to clean themselves out so they wouldn't suffer from their stomachs or anything like that during the dance. They got prepared for the dance in that way.

Mr. ANDERSON. So you would say the ling fish is sacred to the Shoshone and is used in their religious ceremonies?

Mr. WEED. Yes.

Mr. ANDERSON. Thank you, sir.

Mr. Gover, you previously testified before this committee. I'd like to show you a letter that the committee received regarding this problem, which concerns the reservation residents as well. This letter is from the Environmental Protection Agency and was addressed to myself, dated last Friday. Just to quote briefly from the letter, it mentions that there are some environmental violations at the Wind River Reservation, including water quality problems at Diversion Dam. I wonder if you could comment on the specific violations referenced at the reservation? Does that include tribal lands?

Mr. GOVER. In general, the lands along the river where the discharges that are referred to in the letter would occur are owned either in fee or are individual trust allotments. I'm not aware, and I've discussed this with the Chairman and with Mr. Baldes, I'm not aware of any discharges or violations of the Clean Water Act by either the Shoshone or Arapaho Tribes.

Mr. ANDERSON. What would this letter be referring to?

Mr. GOVER. It seems to be referring to violations by private individuals, which, of course, we brought to the attention of EPA and have over the years.

Mr. ANDERSON. Do you have the ability to go after the private land owners who are violating environmental laws at Wind River?

Mr. GOVER. At this point, we do. The reason is that the Water Quality Act was amended in 1987 for the first time to allow tribal governments to assume primacy under the Act. This is a rather extraordinary letter in the sense that they identify a number of violations, concede that these violations have been on-going, and then suggest that it's because the tribe hasn't been doing anything. The fact is that EPA asserts the authority and claims the jurisdiction to enforce the Clean Water Act on the Reservation and simply has not done so. Moreover, since the Clean Water Act was passed, we immediately filed a grant application under section 106 to begin water quality studies on the reservation. EPA missed the statutory deadline for issuing regulations by nine months and that money only now has become available and, of course, we've not yet seen a penny of it. At the very moment that money is released, the Wind River Tribes will implement a water quality system.

Mr. ANDERSON. You heard the testimony earlier of Mr. Baldes concerning Diversion Dam. Would you have any observaions about the EPA letter in that regard

Mr. GOVER. I would. I find it extraordinary that they would compare the sluicing operation at Diversion Dam to the other sorts of water quality problems we've identified on the reservation, such as the car bodies in the river. As bad as the car bodies are, they have virtually no impact compared to a sluicing operation. In that sort of operation, under EPA standards they are allowed to add basically 10 NTUs, turbidity units, to the level of turbidity in the river. What happens when they flush Diversion Dam is they add over 40,000 NTUs. It is a clear violation. EPA has known of it for over 10 years and they've never done anything about it.

Mr. ANDERSON. Any ideas why they haven't done anything about this problem?

Mr. GOVER. They characterize it as a local problem. Of course, if EPA characterized every violation of the Clean Water Act as a local problem, the rivers all would still be filthy.

Mr. ANDERSON. I have no further questions of this panel, Mr. Chairman.

Senator DECONCINI. Thank you, Mr. Anderson.

I have no questions. Senator McCain, do you have any questions of the panel?

Senator MCCAIN. I'd like to thank you all for coming here and providing us with this testimony. I think it has been very helpful to us and we appreciate your being here.

Senator DECONCINI. Senator Daschle?

Senator DASCHLE. Mr. Chairman, I also would like to thank our witnesses for their——

Senator MCCAIN. I do have a question for Mr. Weed. Are those religious practices still followed today, the Sun Dance?

Mr. WEED. Every year.

Senator MCCAIN. So that's still part of the religious ceremonies. And not having the availability of the water and the lake, can you

give me a little example of how that would hamper the practice of the religion? You just don't have the fish, is that the problem?

Mr. WEED. It's a sacred place. What the old timers say is sacred because there is a lot of wild game there and——

Senator MCCAIN. So when you go there to do the religious ceremonies, the game and the fish are not there, is that the problem?

Mr. WEED. When the water goes down, it hurts our feelings because it used to be there before there were too many people around. It used to have water buffalo and that's where it got its name, Bull Lake. Water buffalo means [word given in Native American tongue]. Now, it is interpreted Bull Lake. Also the reservation before there became states, they called it Warm Valley. It is where they camped in winter times. From the wild game they made different kinds of things, like this vest I've got on, they got it from tanning the hides of wild game.

Senator MCCAIN. And all of that is tied into the religious ceremony that is performed every year there?

Mr. WEED. Yes.

Senator MCCAIN. I see.

Mr. WEED. Bull Lake is right in the canyon and it is easy to get at in the winter time. Streams come off down into the canyon and that's why we've got a lot of fish in there. It hurts our feelings when that river goes down and then our fish, we don't like to waste our fish.

Senator MCCAIN. I guess what I'm trying to find out is whether the lack of fish or the wasting of the fish adversely impacts your religious ceremonies and the fish are a part of those ceremonies, is that right?

Mr. WEED. Yes.

[Prepared statements of Mr. Washakie and Mr. Gover with informational material appears in appendix.]

Senator MCCAIN. Thank you very much.

Senator DECONCINI. Thank you all for your testimony.

We will now hear from Mr. Dewey Schwalenberg and Mr. Steven Suagee. Mr. Schwalenberg is director of Native American Fish and Wildlife Society, and Mr. Suagee is attorney for the Hoopa Valley Tribe.

Gentlemen, would you please come forward and be sworn.

[Witnesses sworn.]

STATEMENT OF DEWEY SCHWALENBERG, DIRECTOR, NATIVE AMERICAN FISH AND WILDLIFE SOCIETY, AND STEPHEN SUAGEE, ATTORNEY, HOOPA VALLEY TRIBE

Mr. ANDERSON. Mr. Schwalenberg, we'll start with you. Could you briefly describe your background and what the Native American Fish and Wildlife Society is.

Mr. SCHWALENBERG. My background is I originally started out as a wildlife manager and biologist working with the Department of Natural Resources of Wisconsin. Subsequently, I went to work for the Lac du Flambeau Indian Tribe in northern Wisconsin where I was involved in developing fish and wildlife management programs and developing funding mechanisms to obtain the money to continue there programs. As a result of my work with the Lac du Flam-

beau Tribe, I became a member of the Native American Fish and Wildlife Society, which was formed in 1982 based on the tribal members' need for some sort of a national organization to present tribal concerns and interests in fish and wildlife management to the various Government agencies and organizations and the Congress.

Mr. ANDERSON. And how many members would the Fish and Wildlife Society have? How many tribes are represented by your group?

Mr. SCHWALENBERG. Right now we have 37 tribal members but we have approximately 7 affiliate organizations such as the Northwest Indian Fisheries Commission, which is made up of 20 different tribes, and we have 350 individual members who are professional people working with the tribes in their fish and wildlife programs. So we represent over 100 tribes right now in an advisory capacity.

Mr. ANDERSON. Sir, at the committee's request, you drove six hours from Denver on your own time to look at Bull Lake and some of the areas that were described in the slides, is that correct?

Mr. SCHWALENBERG. That's correct.

Mr. ANDERSON. What did you find based on your observations of Bull Lake in terms of management by the Government?

Mr. SCHWALENBERG. I think Mr. Baldes has quite adequately addressed the technical problems with the management. I think that from our national perspective, what we've found is pretty much business as usual between Government agencies, meaning that they have single management concepts that really have no mechanism for mitigation of these types of technical problems.

Mr. ANDERSON. What is a single management concept?

Mr. SCHWALENBERG. That's when you have one primary use of a resource, in this case the use has been explained and described to me and my personal observation has shown that the use is for irrigation purposes. Consequently, the use for fisheries management or for recreation or other things simply is not being adequately addressed.

Mr. ANDERSON. What did you find with regard to Bull Lake, Bull Lake Creek, and the Diversion Dam area?

Mr. SCHWALENBERG. Bull Lake, obviously, was extremely low at the time that I was there and I concur with the fact that most of the fishery spawning habitat and the nursey areas were well above the water level. I can agree with Mr. Baldes, again, that the trophy fishery that apparently had been there years before could not possibly sustain itself under those types of situations. We also found that in the Bull Creek below the dam area that they have low water flows. It was quite obvious that, again, the reproductive spawning areas of the stream and the nursery areas were below water levels and with fluctuations of stream levels, there was very little practical ability to maintain substantial fish populations in those lakes.

Mr. ANDERSON. And Diversion Dam, what did you fid there?

Mr. SCHWALENBERG. Diversion Dam I found was an extremely interesting situation based on the fact that the water had been diverted from what appeared to be the normal river channel above the dam and was now cutting through a historic silt bed that had been deposited over many, many years previously and was redepos-

iting the silt back into the river. So it appeared that the silt levels behind the dam were extremely high; the sluicing action to remove the silt from the flood gates certainly was impacting the stream below the dam. I might add that at the time I was there the diversion of the water into the irrigation canal was substantial and there was very minimal flow of water actually being diverted down the main river channel.

Mr. ANDERSON. To summarize the questions noted in the opening, do you think the Federal Government is protecting the fisheries at the Wind River Reservation?

Mr. SCHWALENBERG. No; I would have to agree that they certainly aren't protecting the fisheries resources.

Mr. ANDERSON. Do you feel that there is agency coordination here in a proper manner between the Fish and Wildlife Service and the Bureau of Reclamation and BIA?

Mr. SCHWALENBERG. No; there is a definite lack of coordination, lack of comprehensive planning, and a lack of overall management of the resource.

Senator DECONCINI. Excuse me, counsellor. How do you draw that conclusion? Is that just from your observation or do you have more information to support that?

Mr. SCHWALENBERG. The information that I was presented from Mr. Baldes on the lake levels, as an example, the instream flows, the graphic illustration of the changes in the water flows, et cetera, would have to be what I'm using on which to base my impression, as well as some information that I've received concerning the policies of the Bureau of Reclamation, the new fisheries policy. We have some problems with that in the fact that any of the language in the policy that relates to actually management of fisheries is replaced when the term put in "as long as it doesn't interfere with our main purpose." So we find it a very generic policy that probably has no real basis for cooperative management.

Senator DECONCINI. But your conclusion is drawn from more than just this example but other experiences and lack of coordination that you've witnessed?

Mr. SCHWALENBERG. That is correct. We're familiar with other examples. To cite one, we're familiar with the tribal problems up on Fort Berthold concerning instream flow problems created in part by the Bureau of Reclamation management activities. The Northwest historically has problems as well.

Senator DECONCINI. Do you see some pattern here as you inspected this particular area?

Mr. SCHWALENBERG. Yes; as a matter of fact I do.

Senator DECONCINI. Thank you.

Mr. ANDERSON. Mr. Schwalenberg, do you see a stronger role for the tribal governments here in terms of protecting their own fisheries?

Mr. SCHWALENBERG. I think Chairman Washakie hit it right on the head when he said that out of sheer frustration over the entire situation of approximately 12 years of this type of activity going on that the tribal council took strong action. I feel that's where the tribal self-determination and tribal involvement should be but we don't feel that it should take 12 years before the tribal government should be able to be involved in these things. We think through

self-determination that these types of long-term planning mechanisms for the use of resources on reservations should begin with tribal government involvement. That's why we advocate strongly for tribal governments obtaining management programs and for having on-staff professional people to deal directly with tribal governments and deal through what we call bio-political process in management of the resources. I think that's really what's missing. If the tribes would be able to interact in a planning process with these agencies for real technical management, I don't think you would see the Wind River being totally devoid of water. I think it's quite clear that the tribal members walking along side of those streams can say unequivocally that they want water in the streams. I think that's where the grass roots initiative has to come from Unfortunately, we can go through Federal agency policy year after year or item after item and we find that there is very limited ability for tribal governments to deal with the development of that policy at the national level. We find that the governments are always the last entities to be asked for their particular involvement or to be given an opportunity to be involved and that's primarly the reason that the Native American Fish and Wildlife Society was established so that we'd begin to see some sort of interaction at the national policy level.

[Prepared statement of Mr. Schwalenberg appears in appendix.]

Mr. ANDERSON. Thank you, Mr. Schwalenberg.

Mr. Suagee, could you give us your background, sir?

Mr. SAUGEE. I am the on-reservation legal counsel to the Hoopa Valley Tribe. It is a position I've held for a little over 2½ years. I would just like to point out that some of the things that I would be remarking upon about the Trinity River on our reservation are based not only on a review of the legal documents and so forth, but also on personal observation, interaction with the river, traditional fishermen, religious leaders, and so forth.

Mr. ANDERSON. Sir, you've provided the committee with a detailed statement of your views, is that right?

Mr. SUAGEE. That's correct.

Mr. ANDERSON. With regard to some of the issues you've heard described on the Wind River Reservation, do you find any parallels at the Hoopa Reservation in terms of agency coordination and protection of fisheries?

Mr. SUAGEE. Certainly. The focus of our concerns on Hoopa Valley Reservation involve the fishery stream flows to protect our salmon resources, so my comments would be most directed to that aspect of the Wind River situation. The problems we have with stream flows at Hoopa result from the mismanagement of the Trinity River Reservoir about 70 miles up river from our reservation. It is a situation where the Bureau of Reclamation has totally arrogated the policy control over how that reservoir is managed and as a result, again, we have the single use concept, sending the vast majority of the stream flows, over 75 percent, down to the Central Valley Project for irrigation and related purposes.

Mr. ANDERSON. So in terms of what you've heard about the lack of communication and coordination, is that something that you would also find at Hoopa Valley?

Mr. SUAGEE. That's correct. We are constantly advised informally by the Fish and Wildlife Service that there are a number of fishery problems that result from the virtually exclusive use of the Trinity River for irrigation purposes and in a completely different basin but they have been disabled from speaking out within the Interior Department precisely because the Bureau of Reclamation is calling all the shots in the management of this reservoir.

Mr. ANDERSON. Would you advocate a stronger tribal role in this process? Is that a fair statement?

Mr. SUAGEE. Certainly. There are obviously trust duties here to protect the fishery by providing adequate stream flows for habitat and migration out to the sea that are going unmet. The tribe has a fundamental interest in preserving that resource for the benefit of its members and its future generations and we, of course, have some sovereign authority under the Clean Water Act to regulate certain aspects of that. There simply needs to be more coordination in that regard. It hasn't been happening yet.

[Prepared statement of Mr. Suagee appears in appendix.]

Mr. ANDERSON. Okay. Thank you, Mr. Suagee.

Mr. Chairman, I have no further questions.

Senator DECONCINI. Thank you, gentleman. I have no further questions either. Senator Daschle.

Senator DASCHLE. No questions.

Senator DECONCINI. Thank you again, gentleman. Your perspective has been very helpful.

The last panel this morning will be David Allison, Superintendent, Wild River Agency, Bureau of Indian Affairs; Roger Patterson, Regional Director, Bureau of Reclamation; and Bill Martin, Assistant Commissioner for Resources Management, Bureau of Reclamation.

Would you all please come forward.

[Witnesses sworn.]

STATEMENT OF DAVID ALLISON, SUPERINTENDENT, WIND RIVER AGENCY, BUREAU OF INDIAN AFFAIRS; ROGER PATTERSON, REGIONAL DIRECTOR, BUREAU OF RECLAMATION; AND BILL MARTIN, ASSISTANT COMMISSIONER, RESOURCES MANAGEMENT, BUREAU OF RECLAMATION

Mr. ANDERSON. We will begin with Mr. Allison. Mr. Allison, you've heard various points of view from the tribal personnel at the Wind River Reservation as well as the Native American Fish and Wildlife Society. Sir, I wonder if you could tell us whether you agree with any of these views in terms of activities of the Bureau of Reclamation?

Mr. ALLISON. Yes; I do agree with the tribe's view and Mr. Baldes' view, specifically in the instance of Bull Lake.

Mr. ANDERSON. What observations do you have on that matter?

Mr. ALLISON. Last year when the issue came up of shutting down Bull Lake Creek to perform an inspection on the headworks at the Dam, we were notified late on a Friday afternoon that this was going to take place——

Mr. ANDERSON. You were notified by the Bureau of Reclamation?

Mr. ALLISON. I was notified by the Bureau of Indian Affairs, Billings area office staff.

Mr. ANDERSON. What did they tell you?

Mr. ALLISON. They told me that they were going to start shutting down the creek in increments. I believe at that time they were talking about putting in some pumps, they were going to virtually shut it off, put in some pumps to provide some instream flow, 8 CS, and depend on the inflow from the banks to provide the rest of the instream flow.

Mr. ANDERSON. Did that occur? What happened?

Mr. ALLISON. No, it did not. I think after some protest from the tribes, that plan was scrapped and another plan was put in place.

Mr. ANDERSON. Is that an area where you'd say there was a lack of communication that was causing an impact on the tribe?

Mr. ALLISON. I think it was not only a lack of communication but also we were not notified in advance of the activity and I have reason to believe from our meeting that followed that when the tribe took the action to block the road up there that, indeed, this was known in advance. I think there is a gross lack of communication in the coordination it takes to do something like that.

Mr. ANDERSON. We started off earlier noting the questions the committee was looking at and one is whether the Federal Government is protecting the tribal fisheries. Do you believe the Federal Government is protecting the tribal fisheries?

Mr. ALLISON. Overall, no. I think there are some reasons for that in some areas. I find it very frustrating to be a superintendent on a reservation where our trust responsibility is to protect the tribes' resources and fisheries and then to have no instream flows reserved. In this case, the tribes in the Wyoming case have to take that instream flow out of their water rights. It puts tribes in the situation of providing instream flows for everybody down stream. Not only has that happened on Wind River but it has happened also on other reservations.

Mr. ANDERSON. Do you believe that the Federal Government agencies at the Wind River Reservation are properly coordinating their actions?

Mr. ALLISON. No, I don't.

Mr. ANDERSON. Why not?

Mr. ALLISON. I think there has been a lack of communication and I think this is an example of that. Some of the tribal councilmen here testified earlier that they thanked you for your input and the things that you've done over the last year to get us to the point now where we are starting to talk. I'd have to go back to the day that they closed the road off to the Bureau of Reclamation as the starting point for that. It frustrated me to the point that I wrote a letter to my area director on the subject and I believe you have a copy of that letter.

Mr. ANDERSON. Why do you think it takes a committee of the Senate to get the type of actions you've described in terms of communications between the parties? Isn't that something that the BIA would be naturally taking the lead role in doing?

Mr. ALLISON. I feel like there should be more of a lead role in that.

Mr. ANDERSON. From the BIA?

Mr. ALLISON. Possibly, yes.

Mr. ANDERSON. You're the superintendent of the BIA, is that right?

Mr. ALLISON. That is correct.

Mr. ANDERSON. So that would be your role, isn't that right?

Mr. ALLISON. Through the Billings area office usually in these matters. That's why I wrote the letter.

Mr. ANDERSON. But aren't you the superintendent at Wind River?

Mr. ALLISON. Yes.

Mr. ANDERSON. So you would have a part?

Mr. ALLISON. That's correct.

Mr. ANDERSON. Have you done that in the past? Have you taken that role?

Mr. ALLISON. I've only been at Wind River in the last 4 years and I think we've got an improved working relationship with Fish and Wildlife Service. Only until that issue came up did we get involved with the Bureau of Reclamation at my level. I understand there has been some involvement in the past.

Mr. ANDERSON. You've been there 4 years and this problem has been there for some time. Why hasn't your office taken the lead role prior to recent times?

Mr. ALLISON. Since I've been there most of the dealings on the issue has been conducted at a level above the local office.

Mr. ANDERSON. Do you now have the responsibility to take the lead role in this area?

Mr. ALLISON. I feel like I have the responsibility but I feel like some of that rhetoric and exchanges are still going on without involvement of the local agency.

Mr. ANDERSON. Where is the rhetoric and exchanges coming from?

Mr. ALLISON. In the Billings Area Office in some of the meetings that are taking place up there.

Mr. ANDERSON. Between Billings Area, BIA, and who?

Mr. ALLISON. And the Bureau of Reclamation and Fish and Wildlife Service.

Mr. ANDERSON. And you're not involved in that process?

Mr. ALLISON. I haven't been, no, sir.

Mr. ANDERSON. Should you be?

Mr. ALLISON. I feel like I should be, yes, sir.

Mr. ANDERSON. And after this hearing will you be talking to your area director to say you want to be involved in that process?

Mr. ALLISON. After getting the material that I got the other day, I will be talking to my area director about that process.

Mr. ANDERSON. Thank you. I have no further questions of Mr. Allison.

Senator DECONCINI. Mr. Allison, as long as you're right there on that subject matter of cooperation or lack thereof, from your area director, have you ever had any direction of recommendations or anything in the area of trying to find a cooperative solution to deal with this problem?

Mr. ALLISON. On the Bull Lake issue?

Senator DECONCINI. Yes, sir.

Mr. ALLISON. No, sir.

Senator DECONCINI. How about any other issues?

Mr. ALLISON. Oh, yes, quite often.

Senator DECONCINI. When did you first become aware of this being an issue?

Mr. ALLISON. There has been some conversation earlier in the year. I've talked to Fish and Wildlife Service and the tribes regarding their concerns with the level maintained in the Bull Lake Reservoir.

Senator DECONCINI. Over the 4 years you've been there?

Mr. ALLISON. No; this mostly came up prior to the action the tribe took to block the road up there.

Senator DECONCINI. I'm not here to cause you any heartburn, what I'm concerned about is if the BIA has a trust responsibility, how do we—and maybe you can make some recommendations—raise the awareness of the superintendents such as yourself, the area directors, and other supervisory people to try to be a little bit more out there looking at these problems? It seems to me, like you've just said, you think things are better and things can work out and some things can be done, but it just seems to me that we might not even be having this hearing on this subject matter had that just occurred. Not to be critical, but I wonder if you've got any suggestions of how we should go about this because part of this committee's charge is to make recommendations for legislative and executive branch action and we intend to do that. That's why I solicit your response.

Mr. ALLISON. I think there are quite a few issues involved in the management of these waters. On the one hand, we're charged with trust responsibility to protect the fisheries and on the other is being our responsibility to deliver water to the irrigators on the projects for which we have the management responsibility.

Senator DECONCINI. Are those incompatible?

Mr. ALLISON. I think they are, yes, sir.

Senator DECONCINI. So than what you're saying is that there is really a conflict of responsibilities and interest here vis a vis the reclamation water receivers and the Bureau of Indian Affairs trust responsibilities to the Native Americans?

Mr. ALLISON. It is even more of a direct conflict than that, as I see it. I'm in pretty much the same situation on a couple of other reservoirs on the reservation where I'm charged with the delivery of that water out of that reservoir, particularly in Dinwiddy Lake, Ray Lake, and Washakie——

Senator DECONCINI. Based on that premise—and I appreciate your candidness because that's what I think is happening, too, and it is unfair to put people in that kind of alternative situation—but based on that, you lean more towards the delivery of water to the users than you do towards the trust responsibility to the Indians?

Mr. ALLISON. I think that's safe to say. That goes back to some legal issues of who owns that storage. I share also the tribes' frustration in trying to maintain a fishery. It is very frustrating to me as well. They need to get rid of that conflict or decide what that level of responsibility should be. I think that's probably the greatest thing that could ever happen from this committee, not only on this but other issues——

Senator DECONCINI. Trying to resolve these coflicting issues that the administrators find themselves in?

Mr. ALLISON. That's correct.

Senator DECONCINI. Yes, thank you. The committee appreciates your candor.

Mr. Anderson.

Mr. ANDERSON. Mr. Patterson, could you state your name and your current position for the record?

Mr. PATTERSON. Yes, my name is Roger K. Patterson. I am the acting regional director of the Bureau of Reclamation in Billings, MT.

Mr. ANDERSON. And through your position as Regional Director, do you have familiarity with the issues at Wind River?

Mr. PATTERSON. Yes, I do.

Mr. ANDERSON. You've heard the testimony earlier today and are familiar with those issues as well, is that right?

Mr. PATTERSON. Yes, I am.

Mr. ANDERSON. Now, sir, you took a deposition before our committee, is that correct?

Mr. PATTERSON. Yes.

Mr. ANDERSON. And in that deposition you stated that you were aware of where there's any turbidity problems causing any violations of Federal laws at Diversion Dam, is that correct?

Mr. PATTERSON. I didn't say that I wasn't aware of the problem, I said I was unaware of any action that EPA had taken to officially cite the Bureau of Reclamation for that activity. Obviously, I'm aware of the operation and the problems associated with it.

Mr. ANDERSON. And, sir, are you aware of whether there's any turbidity problems that could lead to violation of Federal water law standards at Diversion Dam?

Mr. PATTERSON. I know that during the times that the sluicing is going on, I would not argue that the concentrations of silt below the Diversion Dam are dramatically more than they are during the normal flow operation.

Mr. ANDERSON. And, in fact, that silting and sluicing operation can lead to the killing of fish, is that right?

Mr. PATTERSON. I understand it can, yes.

Mr. ANDERSON. Now, sir, this letter that the committee received from the Environmental Protection Agency states that there are water quality problems at Diversion Dam. Were you aware of that type of problem prior to today?

Mr. PATTERSON. As I said, I wasn't aware that Reclamation had received anything from the EPA. I'm aware of the problem. In fact, we have been trying over the last couple of years to see if there isn't some way that we can refine the operation at the Diversion Dam so that you get more of a constant movement of the sediment through the Dam rather than during a very concentrated period of time.

Mr. ANDERSON. So you recognize you have a trust responsibility to these tribes, is that right?

Mr. PATTERSON. I recognize the Secretary of Interior has that responsibility, yes.

Mr. ANDERSON. And the Bureau of Reclamation is a division of the Secretary of Interior.

Mr. PATTERSON. That's right.

Mr. ANDERSON. So you would also have a trust responsibility in your capacity, is that right?

Mr. PATTERSON. I guess you could say that.

Mr. ANDERSON. If it's not true, tell us.

Mr. PATTERSON. I don't know. Yes, as part of the Secretary of Interior's responsibility, we carry that out. The conflict here is the Bureau of Reclamation has another responsibility and that is the responsibility of operating the Riverton Project, which is the Bull Lake and the Diversion Dam, and whatever. So, taking all those responsibilities, I recognize that they are there, yes, I also recognize that there are some inherent conflicts built into those.

Mr. ANDERSON. Conflicts between the trust responsibility to the tribes and——

Mr. PATTERSON. Conflicts between the use of the water for irrigation, on the one hand, and use of the water for fishery needs, on the other.

Mr. BALLEN. Sir, who uses the water that you're diverting? Does that water go to the tribe or does that go to non-Indians?

Mr. PATTERSON. The water that is diverted under the Riverton Project is a reclamation project, which is a non-Indian project.

Mr. BALLEN. So the water is diverted to go to non-Indians, is that correct?

Mr. PATTERSON. That's right.

Mr. ANDERSON. Based on your understanding of your trust responsibility, do you feel you've completely fulfilled it to the Indian tribes in this area?

Mr. PATTERSON. As I believe I said in my deposition, I'm of the opinion that there are some additional things that can and that should be done to enhance the fishery both in the lake and downstream. I think it's important to recognize that there is just not enough water to satisfy all of the purposes. But I am not satisfied that everything has been done that can be done.

Mr. ANDERSON. All right. If you're not satisfied that everything has been done, would you say that the Government has in some ways not completely fulfilled its trust responsibility to the Indians here?

Mr. PATTERSON. I would say that's true. There are some additional things that need to be done.

Mr. ANDERSON. So the Government has not fulfilled its trust responsibility to the Indians here?

Mr. PATTERSON. I guess that's right.

Senator DECONCINI. Excuse me. Along that line of questioning, how do you weigh those two obligations or responsibilities? You have responsibility as the Regional Director of the Bureau of Reclamation to not only build but to manage, operate, and deliver water as authorized and appropriated by Congress. You have a trust responsibility that is delegated to you from the Secretary. Does that bother you when——

Mr. PATTERSON. It's difficult. Can I give you an example?

Senator DECONCINI. Sure.

Mr. PATTERSON. As was mentioned, last fall, based on the use of the water out of Bull Lake for irrigation, it was drawn down very

low. In fact the irrigators terminated the irrigation season a couple of weeks early because of the low water supply——

Senator DECONCINI. They didn't have enough water?

Mr. PATTERSON. Well, they were concerned that you always have another year and they may not have enough the following year. The Interior agencies, BIA, Fish and Wildlife Service, Reclamation, and the Solicitor's Office got together last October and basically had to make a decision as to how much water are we going to store this year in the lake for irrigation this upcoming year and how much water, if any, should we bypass through the Dam in order to maintain some kind of a fishery in the stream. What we decided to do—and this is part of the reason there's essentially no increase in storage since that time—is maintain 25 cubic per second in the stream below Bull Lake Dam so that we could maintain some kind of fishery and store the remaining amount of water. So that decision was made to try to balance some of the needs on both sides. And that's the minimum flow that's been maintained this winter.

Senator DECONCINI. The reality is, is it not, that you can't do both? It's really impossible to really satisfy both of those responsibilities, is it not, when you don't have the resources?

Mr. PATTERSON. You can't have 100 percent of everything. There is only so much water that comes through this area.

Senator DECONCINI. Thank you.

Mr. ANDERSON. In striking that balance between those two conflicting objectives, you stated that the Bureau of Reclamation has not done all it could have done in the past. What do you mean by that? What areas of improvement do you see out there?

Mr. PATTERSON. First of all, let me tell you how we believe that we need to operate, and that is from Reclamation's standpoint and the operation of the project, our first objective is to assure that the irrigators get a full water supply. After we've taken care of that, or to the extent that we think we can, then we also try to consider what other purposes might be met. This is the area where I think there's some things we can do. If I can take just another minute or two, I'll give you a couple of examples. There are desired minimum pools in Bull Lake, there are desired minimum flows below the lake, and there is also the irrigation, you can't meet all of those so one of the things that we've agreed to do with the other agencies in the Department is see if we can't refine those a little more so that on a year to year basis at least we can make a sound decision on whether it makes sense to store the water available that year or whether it makes sense to try to maintain some kind of a fishery downstream. One of the things that we're looking at to sort of optimize the situation is there is another little reservoir on the chart which is called Pilot Butte and we're trying to determine if somehow we can't in tandem use Pilot Butte to satisfy more of the irrigation late in the year and not have to draw so much on Bull Lake. The other thing that we're looking at is to see whether there is some automation that could take place at Diversion Dam so that we don't get concentrated silt flushing and at the same time, when we have higher flows coming down the Wind, maybe we can take advantage of those which would result in two things: (1) you don't fluctuate the Creek as much out of Bull Lake, and (2) you end up being able to use that water instead of drawing out of storage. So I

guess that's where I'm not satisfied that we have done everything we can in that regard. But the inherent conflict and the recognition that you can't have it all ways has got to be recognized, then we've got to work from that point onward.

Mr. BALLEN. Excuse me, Mr. Anderson, Mr. Patterson, let me just make sure I understand this. This Bull Lake is on Indian land and is part of the reservation?

Mr. PATTERSON. Right.

Mr. BALLEN. And you're diverting the water out for irrigation for non-Indian users off the reservation, is that correct?

Mr. PATTERSON. No; the Riverton Project is also on the reservation. It was established by Congress. A specific Act was taken to set aside the lands for the building of Bull Lake and also authorized that project area for irrigation.

Mr. BALLEN. But some of this water is going to non-Indian users, is that correct?

Mr. PATTERSON. On the reservation, correct.

Mr. BALLEN. Thank you, Mr. Anderson.

Mr. ANDERSON. Mr. Patterson, I want to ask you the three questions I've asked some of the other witnesses. First, whether the Federal Government has fully protected the Indian tribal fisheries here?

Mr. PATTERSON. Put that way, I would say, no, I'm not satisfied that they have.

Mr. ANDERSON. And with regard to agency communication, do you think that's been fully proper and as it should be?

Mr. PATTERSON. No. I would say there is always room for improvement in communication. I would take exception with the phrase that "there's no love lost between Reclamation and Fish and Wildlife Service." I don't believe that's the case. In fact, I would say that the relationship between the two agencies is very good.

Mr. ANDERSON. And there will be steps taken to proceed and improve in this area, is that correct?

Mr. PATTERSON. Well, I would like to. I think we need to. I think it's important that everyone try to do the best we can with what we have down there.

Mr. ANDERSON. Thank you, sir.

Mr. Martin, you've heard the testimony this morning from a variety of different perspectives. I wanted to first of all get your understanding of your trust responsibility to the Indian tribes. Is that your responsibility and the Bureau of Reclamation's or is it the Secretary of the Interior's responsibility?

Mr. MARTIN. Well, certainly, it's the Secretary of the Interior's responsibility, but since the Department of the Interior is made up of several bureaus and officers, I think each of us has some role in helping the Secretary carry out those responsibilities of the Department.

Mr. ANDERSON. And based on that understanding, do you feel that the Secretary through the Bureau of Reclamation has completely fulfilled its responsibilities at Wind River?

Mr. MARTIN. I think, as some of the other witnesses have said, there are some things that can be done to further enhance the fishery resources and the resources that would be available to the folks

on the reservation. I believe that in terms of responding to and carry out the authorized purposes of the Riverton Project, I think the Bureau has done that in accord with the congressional authorization. I think that there are opportunities to use the project flexibility and operating resources to further enhance some of the other resources, such as the fishery, and I think more can be done in that regard, as Mr. Patterson has said.

Mr. ANDERSON. And, sir, why wouldn't that have been done in the past?

Mr. MARTIN. I think there are probably a number of reasons for it, and much of it is probably attitudinal. I think in recent years we have seen a much more flexible attitude on——

Mr. ANDERSON. From whom?

Mr. MARTIN. I think on the part of a lot of different organizations and individuals who are in some of the management roles, either at the state, the irrigation districts, as well as the Federal agencies. I think that has really became apparent in the fairly recent years and I think it's going to be more apparent in the future.

Mr. ANDERSON. Sir, what was the attitude in the past and what is it now?

Mr. MARTIN. I think in the past it was more just——

Mr. ANDERSON. From the Bureau of Reclamation's viewpoint.

Mr. MARTIN. I think in the past it was just looking more specifically at what was authorized and required to meet the letter of the law and not necessarily looking to see how can we use these facilities to do a better job operating to accommodate other needs.

Mr. ANDERSON. In your perspective, that's a welcome direction? That's where it should be going?

Mr. MARTIN. That's correct.

Mr. ANDERSON. And you would expect areas of improvement here at this reservation then with that attitudinal direction?

Mr. MARTIN. I do because I think there are some things that can be done within the authority for the Riverton Project that would accommodate some of the other needs as well. I expect that the Bureau of Reclamation will continue to work to try to accomplish that.

Mr. MARTIN. I have no further questions, Mr. Chairman.

Senator DECONCINI. When you're confronted, Mr. Martin, with this conflict, just out of curiosity, do you sit there with the Secretary and the Commissioner of the Bureau of Reclamation and say, you know, we've got a conflict here. We're charged by Congress to build this reclamation project to deliver this water and at the same time the court has said it is clear that we are the trustee for the Native Americans. I'm trying to piece together how does this happen? What do you guys do? Do you say, well, we'll flip a coin today, or do you just try to balance it out in terms of what we get away with? I don't mean that in the sense of breaking laws or doing anything dishonest, but what can we pull off here in this balancing act to try and satisfy both of these responsibilities?

Mr. MARTIN. In this regard, Mr. Chairman, Mr. Patterson mentioned some of the meetings that have involved the other agencies within the Department, as well as the Solicitor's Office. What we have to do is just take a look at what are the legal requirements,

what do we have to do. Once we determine that, we say now what else can we do beyond that to accommodate some of these other needs that would help——

Senator DECONCINI. When you're determining what you legally must do, you're making a list here, from the Bureau of Reclamation's column, we legally have to follow what Congress says to do in the matter of water. What's in the column for trust responsibilities? Does the Solicitor there say the definition under the law and the courts is that a trustee must put first the priority of the beneficiary at all times and do everything that they reasonably can, and that's my interpretation of the law, to promote and be sure that the assets of the trustee are well protected. Is that part of the weighing system? Does it go that far?

Mr. MARTIN. As the Solicitor is taking a look at the legal requirements at the legal responsibilities, he would have that in mind as he's giving us the legal advice.

Senator DECONCINI. That doesn't come up in your discussions with him, it's just based on what his advice is, you think he's weighed that?

Mr. MARTIN. Yes. And it might even come up in the discussions with him. In this particular case, I know that he has done a pretty thorough job of researching the responsibilities, not only the legal responsibilities for the Riverton Project but also in relation to the Secretary's trust responsibilities.

Senator DECONCINI. It seems to me, not being a solicitor but having practiced law and understanding what the trust responsibility is, it is so clear and most people will testify, no, we probably have not met the trust responsibility but there's a lot of good reasons for that because there is a definite conflict here that can't meet that trust responsibility when the Congreess says go do this with this water, at least that's the reason that you can't say in all good conscious and honesty that yes, we've met that trust responsibility. Obviously, meeting the trust responsibility would be to manage that water for the absolute best purpose for the Native Americans so that they get the maximum use and benefit, economically and religiously and everthing else, for their use. But you've got another charge, don't you?

Mr. MARTIN. That's correct.

Senator DECONCINI. You've been told to do something else by Congress.

Mr. MARTIN. Yes.

Senator DECONCINI. Thank you. I have no further questions.

Mr. Ballen.

Mr. BALLEN. No questions, Mr. Chairman.

Senator DECONCINI. Gentleman, thank you for your candid testimony in helping us address this very difficult problem. I don't envy what you have to do everyday over there trying to come up with solutions.

The committee will stand in recess until 3 p.m. this afternoon.

[Whereupon, at 12 noon, the committee recessed, to reconvene at 3 p.m. this same day.]

AFTERNOON SESSION

Senator DECONCINI. The special committee will come to order.

Our first witness this afternoon is Curtis Canard, Consultant to the Sac and Fox Nation with Tribal Geotechnical Services, Inc., in Tulsa, Oklahoma.

Would you come forward, please, Mr. Canard?

[Witness sworn.]

Senator DECONCINI. Mr. Anderson.

STATEMENT OF CURTIS CANARD, CONSULTANT, SAC AND FOX NATION WITH TRIBAL GEOTECHNICAL SERVICES, INC., TULSA, OK

Mr. ANDERSON. Mr. Canard, what is your business, sir?

Mr. CANARD. I am a certified petroleum geologist consulting in the Tulsa area. I'm respresenting the Sac and Fox Nation today concernig their drinking water supply and the contamination of that, the loss of some surface lands from flooding and potential ponding, and also the loss of some recoverable oil reserves.

Mr. ANDERSON. Are you a consultant for the Tribe? You're not respresnting the tribe as a tribal members?

Mr. CANARD. No; as a consultant.

Mr. ANDERSON. And can you describe for the committee what the background of the contamination is? First of all, sir, why don't you tell us what contamination is at the Sac and Fox Tribal lands and when it was first discovered.

Mr. CANARD. The drinking water supply has been contaminated since the early 1950s. The drinking water supply—or the fresh-water aquifer, as we refer to it as geologists—exists from a depth of 25 feet to about 250 feet.

The members of the Sac and Fox Nation began to complain in the early 1950s about the poor quality of the water, and that it was not drinkable.

Mr. ANDERSON. Are there other sources of drinking water at the reservation?

Mr. CANARD. No. This is the only natural source of drinking water—between 25 and 250 feet.

Mr. ANDERSON. And after they complained to the officials in 1950, what happened?

Mr. CANARD. The first well was drilled in about 1964. Again, the entire zone was contaminated with salt water—high chlorides, bitter taste. That particular water did not fit the guidelines for drinking water of the U.S. Health Service.

In 1970, the Indian Health Service came on board and did some exploration and discovered that there was a fresh-water supply about two miles south of the reserve, and consequently two wells were drilled, and those two wells now furnish the entire drinking water supply for the domestic needs of the Sac and Fox Nation.

Mr. ANDERSON. And to explain briefly, that contamination was caused by what entities?

Mr. CANARD. The oil companies have been producing oil in and around the Sac and Fox Tribal lands since 1938. The primary production was very flush during World War II. After the war, the production declined and industry went into a secondary recovery

method, which we refer to as a waterflood. In this waterflood, they have injection wells that inject, under high pressure, salt water or oil field brine. Certain wells, then, remain as producing wells.

The theory behind all of this is that the injected water in the oil reservoir will push and sweep the oil to a producing well.

That's all fine and good, but in this particular case we have what we call a "leaking bucket" concept—a leaky reservoir. The water that was injected into the subsurface was not controllable. The water migrated into some of the shallow strata, into some of the old, abandoned wells, into the fresh-water supply zone that had shallow depths, which we refer to as the "Vamoosa Aquifer."

Many studies have been done since the 1970s. Each study addressed the same question. Each study came up with the same conclusion. The contamination or the loss of the fresh-water drinking supply on Tribal lands resulted from the oil industry's activities on the reserve.

Mr. ANDERSON. Sir, is this a violation of any federal laws or state laws at the time it occurred?

Mr. CANARD. We go back to 1952, when the unit was put together with the various oil companies. This was done under the auspices of the State of Oklahoma, the Oklahoma Corporation Commission. It was approved by the Department of Interior because the Sac and Fox would receive their proportionate share of production from this big water flood.

Mr. ANDERSON. So there are no federal or state laws, at least at the time it initially occurred back in the late 1950s; is that right?

Mr. CANARD. No; the Department of Interior more or less followed the lead of the State.

Now, as time went on, additional wells were drilled, additional wells were abandoned and plugged. This is when the contamination started to occur. We see a timeframe between 1948 and 1952 when large amounts of salt water were injected into the oil-producing reservoir down at 3,000 feet.

Mr. ANDERSON. After the initial discovery by the Public Health Service in 1974, what was the next study done by the Government? And when did the BIA first get notice of this problem?

Mr. CANARD. Well, we had a study in 1978 done by the U.S. Geological Survey.

Mr. ANDERSON. Who was that done for, sir?

Mr. CANARD. It was a regional study to determine the fresh-water resource of a large regional area in east-central Oklahoma. It is one of the major fresh-water aquifers in the State.

They found that under the tribal lands the fresh water was contaminated and it had high chlorides and it was not suitable for drinking water. That was in 1978.

In 1979, the BIA funded several technical studies to try to determine again what was contaminated, what caused the contamination, and what were the conclusions. That started in 1979.

Samples were taken—surface samples, water samples. Wells were drilled——

Mr. ANDERSON. Sir, what were the conclusions of those studies? Did they find contamination?

Mr. CANARD. The same conclusion that we have today was discovered in 1979.

Mr. ANDERSON. And were there recommendations made to the government on how to proceed with those conclusions?

Mr. CANARD. Well, the recommendations were that the polluting waters were caused by various activities from the oil industry, and more or less determined that it is documented that the salt water contamination was caused by improperly plugging wells, improper management of the surface and sub-surface activities by industry, which was also being monitored by BLM and the BIA.

Mr. ANDERSON. And since that time has the government taken any action to followup on those studies in terms of either cleaning up the water or pursuing any litigation against any of the liable parties?

Mr. CANARD. Well, another study was done in 1980 where the BIA did a surface water study and looked for other dam sites, perhaps, for surface waters, looked for areas where they could buy water rights for the tribe.

They started to look more or less for replacement waters, rather than trying to correct the damage that had already been done in the sub-surface.

Mr. ANDERSON. And were those recommendations followed up? Does the tribe now have replacement waters on the Sac and Fox Reservation?

Mr. CANARD. No; but there were some additional studies done again.

Mr. ANDERSON. Let met interrupt you, sir. Were these studies necessary? Is that part of determining the problem? I notice you're talking about a long delay here. Is that something that is a justifiable action on behalf of the Government?

Mr. CANARD. We think in 1979 there was enough technical documentation available that law suits could have been brought. We know that the contamination was more or less irreversible, that what you have to look for is replacement of that reserve.

Mr. ANDERSON. So your understanding is that in 1979 the government had enough data at least to begin some type of legal action in this matter; is that right?

Mr. CANARD. Yes, sir.

Mr. ANDERSON. And who would that legal action be filed against?

Mr. CANARD. Initially against oil companies that were operating on the property. As we went on through time, in 1982 and 1984 more studies were done on groundwater contamination. All these studies came to the same conclusion.

In 1986, the Environmental Protection Agency came in, the Office of Drinking Water, and did a different type of analysis, but it proved the same thing: the contamination of the aquifer is extensive and it is beyond rehabilitation.

Mr. ANDERSON. Sir, it is now 1989. At the present time, has any litigation been filed on behalf of the tribe in this matter?

Mr. CANARD. In 1977 the initial application was made to file suit against certain oil companies to ask for damages—both permanent and temporary—on their surface waters, their ground waters, and a loss of some of the surface lands.

Here it is 1989. We have had 19 years of study by the BIA, BLM, USGS, the Office of Surface Mining, and the conclusions are all the

same. We have lost our drinking water supply. It needs to be replaced. And this has been known now for years and years.

Mr. ANDERSON. Do you know of any reason why that action hasn't been pursued by the Government? Why such a delay for 19 years?

Mr. CANARD. I think in one case you're looking at an overlap of responsibility whenever you have the Indian Health Service doing one study, the Office of Drinking Water at the EPA doing another study, the BIA funding other studies. It appears that in this particular case that the responsibility to protect these resources has more or less been split to other agencies and there is no followup. Different agencies have different funding requirements, different selection requirements, and there is just no follow up on the technical studies that were done. We don't see that in the files.

Mr. ANDERSON. You prepared a report for the Tribe on the chronology of this matter; is that correct?

Mr. CANARD. Yes, sir.

Mr. ANDERSON. And who would you see as the person or the entity who should have the lead role in following up on this?

Mr. CANARD. It would have to be the Bureau of Indian Affairs.

Mr. ANDERSON. And have they done that followup?

Mr. CANARD. Not from a technical standpoint. I don't find that in the files.

Mr. ANDERSON. Can you give the committee an idea of the scope of the contamination here, from your background?

Mr. CANARD. Well, we see contamination from the main producing oil reservoir at 3,000 feet. There are areas above that in different strata at 300 feet, and up at 25 feet or 100 feet—different degrees of contamination throughout the reserve, both on tribal land and off tribal land. So it is extensive, and we're looking at 800 acres of lost drinking water supply.

We might recommend that for the short term that a drinking water supply can be replaced by buying water rights in Stroud, OK, which is 5 miles away, building a treatment plant, pipeline, and a river crossing. We're looking at costs to do this for the water rights and construction of the plant and the pipeline of about $1 million, with annual operating costs approximately $225,000. That's just for the short-term.

Without this drinking water supply for so many years, the tribe has suffered from a lack of economic development. There is just no water available.

So for a long-term benefit, I think that we would have to look at the acquisition of replacement lands.

Mr. ANDERSON. Are there any lessons, based on your analysis of this issue, that the committee can draw in terms of a recommendation that we could pursue in protecting a tribe's drinking water?

Mr. CANARD. Well, certainly if we can identify one federal agency that can be held responsible and that we can go to and have followup, then probably a lot of this wouldn't have happened.

With your inter-agency agreements and memorandum of understanding, we feel like this is where the control and the responsibility sort of——

Mr. ANDERSON. Are you saying the tribe needs one government entity they can go to and say, "This is your job to protect the water."

Mr. CANARD. Yes, sir.

Mr. ANDERSON. And that is not happening now?

Mr. CANARD. That's not happening.

Mr. ANDERSON. Mr. Chairman, I have no further questions.

Senator DECONCINI. Thank you.

Thank you very much for your testimony. I'm sorry I got called out there, but I appreciate your being with us today.

Mr. CANARD. Thank you.

Senator DECONCINI. We'll have a panel now of: Elmer Manatowa, E. William Rice, Truman Carter, and James L. Welsh.

Would all of you please come forward, please.

[Witnesses sworn.]

Senator DECONCINI. Mr. Anderson.

STATEMENT OF ELMER MANATOWA, CHIEF, SAC AND FOX NATION, STROUD OK; WILLIAM RICE, ATTORNEY GENERAL, SAC AND FOX NATION, STROUD, OK

Mr. ANDERSON. Chief Manatowa, you are the chief of the Sac and Fox Tribe; is that correct?

Mr. MANATOWA. Yes, sir.

Mr. ANDERSON. And you heard the testimony of Mr. Canard; is that correct?

Mr. MANATOWA. Yes, sir.

Mr. ANDERSON. Is that an accurate reflection on your experiences with the Government? You do not have someone to turn to in a lead role?

Mr. MANATOWA. That is correct. Looking at all the studies that have gone by in the past, and from all the information that we can gather, from what Mr. Canard is saying, yes, we have thought of the Bureau of Indian Affairs for years as the lead agency that has the trust responsibility for our relationship, and those are the people that we have turned to. We haven't gotten results so far.

Mr. ANDERSON. When did the tribe first ask the BIA for some action in this matter?

Mr. MANATOWA. In 1977 we passed a resolution asking that they take the lead in filing a suit with the Justice Department.

Mr. ANDERSON. And as of today, as Mr. Carter noted, there has been no action filed; is that correct?

Mr. MANATOWA. None that I know of. If they have, they have not notified us. The only notification is that they need another study.

Mr. ANDERSON. And how did that affect the tribal revenues or opportunities for economic development?

Mr. Rice in your position as Sac and Fox Tribal Attorney, you could also address that question.

Mr. MANATOWA. I think there has been tremendous impact as far as the area that Mr. Canard pointed out to you as being a highly contaminated area. We do not have the water facilities located in that area to handle any additional supply for attraction which is needed for industrial development. So we have to go elsewhere to accomplish the items that we want to be accomplishing.

Mr. ANDERSON. And do you have companies give you that as a reason why they can't locate their company on the reservation?

Mr. MANATOWA. There is no company on the reservation because of that very fact. Yes, there are companies who have approached us who would like to come in to work with the nation for further development for us in economic and industrial development.

[Prepared statement of Mr. Manatowa appears in appendix.]

Mr. ANDERSON. And, Mr. Rice, in your experience with trying to attract the companies to the reservation, how has this drinking water supply problem affected the ability to attract outside business?

Mr. RICE. Well, the drinking water supply itself, Mr. Anderson, has been a critical problem in the development. For any economic structure you must have both a legal infrastructure and a physicial infrastructure. I believe the Sac and Fox Nation has done a remarkable job in creating a legal infrastructure conducive to business in their territory; on the other hand, one of the critical requirements of physical infrastructure is water supply. You have to have it not only if the industry that you're talking about uses water, but if you move a plant of 500 people onto the Tribal property, you must at that point have water for 500 people for between 8 and 24 hours a day. That simply does not exist.

We have had several offers come by my office for people wanting to move large-scale industrial plants into the jurisdiction of the Sac and Fox Nation. One of the critical requirements of a lot of those has been a water supply that was stable and was large enough to meet their needs. That simply has not existed.

Mr. ANDERSON. What current water supply do you have on the reservation? How much water are you getting?

Mr. MANATOWA. We have—do you want me to answer it?

Mr. ANDERSON. Certainly.

Mr. MANATOWA. We have a supply located two miles south. We had to move that far away to locate and lease a piece of property, and had some tests done on it and found that it was suitable drinking water. And we have had to go two miles south to drill two wells and then transport the water back to the reservation.

Now, this water is producing at about eight gallons a minute, and seems to have a pretty good recovery system, but we are reaching the limits on the reservation property with the facilities that we have located there, so no further expansion that we see can be done without additional water supply.

Mr. ANDERSON. And you have been familiar with the chronology of this matter. Can you offer us any explanations of why it has taken so long to file this lawsuit on behalf of the tribe?

Mr. MANATOWA. I cannot offer you the reason why. I can only look back and see the studies, Mr. Anderson. Apparently, in looking at the studies and some of the history that has occurred, the Bureau of Indian Affairs was either unwilling or unconcerned to proceed to do anything for the Sac and Fox Nation. The studies were done, the conclusions were drawn, the recommendations are there.

In fact, there was a period of about 1981 to 1983, I believe, in which some of the records were moved from one location to the other and apparently were lost.

Mr. ANDERSON. And what did that do to the process of the case when the records were lost?

Mr. MANATOWA. The process of the case came to a standstill.

Mr. ANDERSON. And was any reason ever offered you as to why that happened, what had occurred?

Mr. MANATOWA. Not to my knowledge, other than they just didn't—not to my knowledge. I couldn't answer that one.

[Prepared statement of Mr. Rice appears in appendix:]

STATEMENT OF TRUMAN CARTER, TREASURER, SAC AND FOX NATION, STROUD, OK AND JAMES L. WELSH III, DIRECTOR OF REAL ESTATE, SAC AND FOX NATION, STROUD, OK

Mr. ANDERSON. Mr. Carter, in your position as the Sac and Fox treasurer, can you offer any solutions to the drinking water problem there? You have some testimony in your statement about land acquisitions. Could you describe that, sir?

Mr. CARTER. From 1983 until 1988 I was the person at the tribal office in charge of the land acquisitions program. Since 1983, the Sac and Fox Tribe has authorized a seven-year land acquisition program, and the tribe has set aside $50,000 each year expressly for the purpose of acquiring additional land.

The tribal members are extremely concerned about the precarious situation we have with the water supply at the Tribal lands located in Lincoln County.

We have been in a tremendously successful expansion mode as far as economic development goes in the 1980s, but we are stifled as far as attracting the private sector onto the Tribal lands in Lincoln County because we don't have an adequate safe water supply to attract industry there. We are barely meeting our own needs right now.

We have an out-patient clinic and we are performing food distribution services, and our needs are increasing. We have a total of 60 employees at the Sac and Fox tribal office now. In 1982, there were only 14 employees there.

Commercial development for water is just out of the question right now. We have to go elsewhere.

Mr. ANDERSON. Sir, in terms of your economic ventures or opportunities, you said you have had to go outside the reservation? Could you explain that?

Mr. CARTER. Yes, from its inception until January 1989 I was treasurer of the Sac and Fox Industrial Development Commission.We acquired a 4.21 acre tract of land in the industrial development park in the city of Cushing, OK. We have to use Cushing's local water supply if we are going to try to do some business development efforts in that area. We have to look to cities.

Mr. ANDERSON. How far away is that from your reservation?

Mr. CARTER. That's approximately 30 miles from the tribal office complex.

We have also acquired 11.25 acres of land in Shawnee, just adjacent to the Shawnee city limits. We have to use the local city water supply.

When I was on the Industrial Development Commission we obtained a $30 million Department of Defense Contract. We have plants in the cities of Idabell and Commerce, OK. There is not——

Mr. ANDERSON. How far away are those cities from your reservation?

Mr. CARTER. Those are approximately 150 to 200 miles away from the tribal office complex in Stroud.

Mr. ANDERSON. So in order to develop your own economic ventures, you have got to go from 30 to 150 miles away; is that correct?

Mr. CARTER. Exactly. We are in a precarious situation. We don't know when this precious small water supply is going to dry up. If that does, we're not going to be able to provide health care services on our lands, we're not going to be able to have normal, everyday human functions that are going to have to go on.

From time to time, when there has been interruption with that well-water supply for all of our employees and visitors that come on tribal lands daily, we have had to obtain portable outhouses. It is a tremendous inconvenience. We have had some contamination problems from time to time with that water. We're just barely trying to meet the needs of the people that are there everyday, and commercial development is just out of the question. We have to look elsewhere.

We want to stay within reservation boundaries. We want to do business development right there.

Mr. ANDERSON. But you can't at the current time; is that correct? You can't expand in a great fashion because of this water problem; is that correct?

Mr. CARTER. Exactly. It's out of the question at this point.

Mr. ANDERSON. In terms of your understanding of the background of this, can you offer us any explanation of why it has taken so long to bring the litigation against whatever parties are liable to the tribe?

Mr. CARTER. As a practicing attorney, I have absolutely not the foggiest idea why it has taken so long to get this matter resolved.

Mr. ANDERSON. Could it be that the data has not been available to the government? Is that a possible reason?

Mr. CARTER. It is my understanding that all the information is there for the federal officials to proceed in the matter.

Mr. ANDERSON. Has the tribe consistently asked the government to bring litigation on behalf of the tribe?

Mr. CARTER. Repeatedly. It seems like the BIA has repeatedly dropped the ball with regard to our water contamination problems here 5 miles south of Stroud, and we have to constantly keep reminding the Bureau officials by asking them what the status of this case is and where we are, because it is taking extremely too long.

Mr. ANDERSON. Do you think in the past—and lets look at the current time, also—do they understand the seriousness of this problem to the tribe?

Mr. CARTER. It is a difference in value judgment. The Bureau of Indian Affairs officials don't have to live there on those lands. They don't have to work there every day. They don't have to deal with this lack of water problem with the lack of a safe drinking water supply. It is kind of out of sight, out of mind, out of touch.

We are faced with that every day. It is on our minds every day. Something has got to be done.

Mr. ANDERSON. Mr. Welsh, you also work at the tribe; is that correct?

Mr. WELSH. Yes, sir; I am the Director of Real Estate for the Sac and Fox.

Mr. ANDERSON. And aside from these water contamination problems, you have also worked with the Bureau of Indian Affairs on various matters in protecting the tribe's resources; is that right?

Mr. WELSH. Yes, sir; I have made inquiries to the Bureau of Indian Affairs of why it has taken on the average about 6 to 7 years per abandoned well to even recognize that they have been abandoned. There is land restoration problems that have never been fixed. It, in turn, is destroying the water values of the allottee holders now. The BIA, in fact, did not handle this 800 acres of tribal ground correctly. They surely are not going to be able to control the 18,000 acres. I have major problems all over that tribal territory.

Mr. ANDERSON. What kind of problems would those be?

Mr. WELSH. There is no coordination between the BIA to get the BLM, as surface manager controls—they have just literally dropped the ball. I've got destroyed property out there that is totally adding up into the millions and millions of dollars.

Mr. ANDERSON. Who has destroyed the property, and who would be responsible for inspecting that or discovering that type of damage?

Mr. WELSH. Well, the majority of the damage has been done by oil companies. We look upon the Bureau of Indian Affairs as the surface land managers who, in turn, are supposed to protect and enact any kind of inspections to make sure that these things are done properly.

The BLM will not make a move until the Bureau of Indian Affairs does, in fact, call upon them. Once that call is made, the ball is dropped. And when it does, it now has continued in to 5 and 6 and 7 years.

I found a well the other day that has been abandoned 15 years and nobody knew about it.

Mr. ANDERSON. Has that well or that problem been reported to BIA and BLM?

Mr. WELSH. BLM is currently on it. Yes, sir.

Mr. ANDERSON. And which office of BLM would that be?

Mr. WELSH. Tulsa.

Mr. ANDERSON. And which office of the BIA would that be?

Mr. WELSH. The Shawnee Agency.

Mr. ANDERSON. And what is the area office for BIA?

Mr. WELSH. Anadarko.

Mr. ANDERSON. Are there other—you mentioned coordination, or lack of it, by the Bureau of Indian Affairs; is that right?

Mr. WELSH. Right.

Mr. ANDERSON. Are there other examples—let me open this up to the panel—that you have to offer the committee in terms of a lack of coordination by the BIA?

Mr. WELSH. From my standpoint, Mr. Anderson, they not only show a lack of coordination between their own departments and

other branches of the U.S. Government, but they can't control, for example, their appraisal division. I have run into fraudulent appraisals that have been used to, in fact, lease and sell rights of ways for Indian allotment holders. That is not the determination of the BLM to do. We're back to our grandfather, who is supposed to, in fact, take care of this property—the BIA.

They have done a mismanagement, a gross negligence, of every leasing action, of every destruction of the water. This water business that we're talking about and the environmental impact that we have had is on a magnitude of the Alaska oil spill that just currently happened. It is on the same magnitude as that, but every year for the last 19 years.

If you didn't know that in 19 years, or claim that you didn't there has been a miscoordination between their own people. It's almost like they have forgotten their telephone numbers between each other. They are simply not doing anything.

Mr. ANDERSON. How did you discover these appraisal problems that you have identified?

Mr. WELSH. To give you an example, on a couple of pieces of property——

Mr. ANDERSON. Does the tribe currently have authority for appraisals? How did you——

Mr. WELSH. We currently do now, sir.

Mr. ANDERSON. When did you receive that?

Mr. WELSH. The first of the year.

Mr. ANDERSON. So prior to that the BIA had handled this program; is that right?

Mr. WELSH. Yes, sir. I have property out there that is on Indian allotment ground that has been leased on which we dug up appraisals. On the last two and three and four years these things have been used as city dumping grounds, and the appraisal doesn't mention anything about it. There is, in fact, property there that cannot be leased that has never been made mention of.

Mr. ANDERSON. And prior to January, when you assumed this program, you weren't aware of these or didn't have the ability to learn of these appraisals; is that right?

Mr. WELSH. Not personally. No, sir.

Mr. ANDERSON. What happened when you first got all the appraisals from BIA? You took over the program from BIA? What kind of things did you learn when you got their project?

Mr. WELSH. As quickly as we could we started inspecting the property. We went to these garbage dumps. There have been letters to the Bureau of Indian Affairs and the higher echelon management group of these people that have written back six and seven years ago to our Indian allotment holders that it wasn't their business to take care of this, but it was the Indian landholders whose job it was to clean this mess up.

Of course, from those actions we kept looking and looking, and we keep running into fraudulent appraisals.

I ran into one a week prior to getting here. It was regarding the rights of way and the easement action for a transmission line.

The appraisal was at $9,000. The bid happened to be at $8,800. The Bureau of Indian Affairs tried to push the appraisal. They got

all the deposits up in December. Before we took over, this thing was going to be approved.

The Sac and Fox got a hold of it, we started studying it. We have now found out that the Bureau of Indian Affairs never did the appraisal. They reviewed the transmission lines appraiser. The transmission people actually hired the appraiser to go do this.

Senator DECONCINI. Excuse me. Do they do their own appraisals?

Mr. WELSH. The BIA is supposed to—

Senator DECONCINI. In house?

Mr. WELSH. Yes, sir.

Senator DECONCINI. Even that is likely to be, or might be, suspect, is it not?

Mr. WELSH. Yes, sir; it is.

Senator DECONCINI. It is going to substantiate what the final decision is, and it is made within house.

Mr. WELSH. Yes, sir.

Senator DECONCINI. They do not do any outside appraisals on any of the cases that you have been involved in?

Mr. WELSH. We are finding out that there may have been some outside appraisers used at times, but——

Senator DECONCINI. Normally they don't?

Mr. WELSH. No, sir. It is the area appraiser.

Senator DECONCINI. And in this case they did no appraisal and they used the appraisal of the utility company?

Mr. WELSH. Yes, sir; there was no fairness to our Indian landholders at all. We have currently put a stop to the negotiations on that until we find out what in the world happened.

The Bureau of Indian Affairs just didn't give a rat's tail end about that Indian property at all. And in return they have allowed the checkerboarding of property going through easements that has destroyed the water, destroyed the investment value. We have property that we have city sewage on that is currently got to the edge of it. I couldn't spit in one direction without hitting an easement. It is literally checkerboard across the ground.

Mr. ANDERSON. What kind of attitude do you have in terms of your sense of the advocacy from the offices from BIA that represent you? Anyone can comment on that.

Mr. RICE. I believe I'd address that one—to a point, anyway.

One of the bigger problems we have here is an attitude problem. The "Tulsa Tribune" did a series on the Bureau of Indian Affairs here a couple of years ago, and one BIA official was quoted in there as saying that if these Indians think that we're supposed to follow these leases from cradle to grave and take care of them as if they're our own, they have another thing coming—or words to that affect.

In my view, that's exactly what they're supposed to be doing. They are the trustee. They are supposed to be acting as a trustee.

We don't see that happening, and that type of attitude flows over into acquisition of trust lands, protection of the water, support for tribal government, into the whole realm of things that the Bureau of Indian Affairs is supposed to be doing.

Mr. ANDERSON. Do you think the tribe could have done a better job in those areas?

Mr. RICE. They certainly couldn't have done worse in a lot of respects.

When you are an Indian out there in the sticks, or even as a tribal government, you look to the BIA as the person you are supposed to go to see about these things. When you get over to the BIA and you start trying to talk about lease enforcement—whether it is a cancellation for a material breach, filling in pits, closing out old wells—it is almost like Alice in Wonderland's tea party. You go around here and you're trying to drink tea, and everybody else has got the cups and is drinking the tea but the Indians. We are the last ones to know that the lease has been assigned. We're the last ones to know that there are operators on the lease. We're the last ones to know what the production records are.

You go over to the Bureau and they send you to the MMS who sends you to the BLM who sends you back to the BIA, and you've got a three-corner game of catch there.

My experience has been that you can't match the production records up from BLM against the royalty payment records from MMS, and neither one of them match sometimes what the BIA has. The oil company records are even different than that.

As the Attorney General for the Tribe, we have the responsibility of collecting oil and gas severance taxes that the Tribe levies and collects. We have been in the weird position of having the oil companies coming in and admitting more production than we have ever been able to find from the MMS.

We go over and ask the MMS how much production there was on XYZ oil well. They give us numbers. We go over and ask the oil companies in tribal court through a set of interrogatories, "How much production did you have from XYZ oil well?" They give us another set of numbers that are oftentimes substantially higher than what we have been receiving from the Federal agencies.

Now, I don't know what the answer is, at least at that point, but I do know that there is something wrong some place when the oil companies are willing to admit more production than any Federal agency we talked to knows about. When they have an oil spill and this guy right here negotiates ten times as much surface damages as the BIA appraisers say there are on the ground—they have appraised surface damages at a couple of hundred dollars, and the Tribe has gone out and negotiated settlements in the thousands of dollars with the oil companies.

I would say that we can't do very much worse. And, in some cases, I think we can do a lot better.

Mr. ANDERSON. Mr. Welsh, would that apply to your program in terms of appraisals where you think the Tribe can do a better job than the BIA has done in the past?

Mr. WELSH. Mr. Anderson, there is no possible way that we can't do a better job. There has been gross mismanagement. There has been a neglect of the responsibilities from the BIA to the Indian allotment holder, not to mention this tribe. This tribe has surrounded themselves with the capable managers to, in fact, match wits with anybody who wants to run into them, and right now we're running into the Bureau of Indian Affairs and the major oil companies.

Mr. ANDERSON. Are you aware whether BLM's drilling and abandonment program has worked and been sufficient on the reservation? Could you comment on that, sir? Have inspectors been on the reservation to plug these wells?

Mr. WELSH. There again, Mr. Anderson, like I said, I have found wells that are 10 and 15 years abandoned that nobody knew about. My goodness, the appraisals, alone—assuming that they did their job and they went out and looked at each piece of property to be reappraised year after year after year, somebody would have caught on to it. Somebody would have seen the damage of the oil spills, the salt water spills. Somebody should have reported it. The reason it hasn't been is that nobody bothered to look at any given time.

BLM is not going to go out of their way until the Bureau of Indian Affairs calls them. The Bureau of Indian Affairs, on the average, has never called anybody. Their own appraiser hasn't even gone out to the ground to look at it, much less BLM or the other Federal jurisdictions.

Mr. ANDERSON. Who loses money when the appraisals aren't done correctly, as they should be done?

Mr. WELSH. The Indian allotment holder. He's not getting the highest and best use of this ground, and if you haven't bothered to check on your appraisals to perform the highest and best use of it, that's how your ground starts getting checkerboarded by easements. That's how your ground gets devalued. That's how your ground gets salt water spills and no restoration, because nobody is checking.

[Prepared statement of Mr. Welsh appears in appendix.]

Mr. CARTER. Mr. Anderson, may I elaborate on these BIA appraisals? I was the man at the Sac and Fox Tribe who had to deal with these BIA appraisals.

I was the tribal geologist from 1982 until 1988. Whenever the tribe received information that there was an oil and gas or saltwater spill on tribal lands—we're just talking about his 800 acres in Lincoln County, the tribally owned land—we notify the Bureau of Indian Affairs Office, Shawnee Agency. We notify the Tulsa Office of the Bureau of Land Management.

I can illustrate the problems we had with this. In one instance, the Bureau of Indian Affairs' Shawnee Agency Superintendent wrote a letter to the tribal official and said, "Do not accept less than $100 for this damage to the tribal property." In fact, the tribe accepted the oil company's offer of $1,000 after the oil company representative, the tribal representative, and folks from the Bureau of Land Management came down and looked at the site.

In another instance, the Shawnee Agency superintendent wrote a letter to the Tribal officials saying, "Do not accept less than $200 for this oil spill." In fact, the tribe accepted $1,435—a tremendous difference between what the tribal representatives and the oil company representatives, on the one hand, saw and viewed the damage and extent of it; and what the Bureau officials saw.

Another time, the Bureau Shawnee superintendent wrote a letter to tribal officials saying. "We recommend that you accept $100 as full settlement." In fact, the Sac and Fox Nation accepted $6,900 as full settlement for this surface damage because of oil spills on tribal land—a tremendous difference.

We can't stand much more BIA protection. [Laughter.]

Senator DECONCINI. Let me ask you a question on that subject matter of settlements. When you were able to reach the better settlements, was it under threat of suit?

Mr. CARTER. No, sir.

Senator DECONCINI. It was not?

Mr. CARTER. It was just simple. There are simple tasks, and simple problems.

Senator DECONCINI. These are negotiated settlements, not on the basis of a threatened court case.

Mr. CARTER. No, sir. We went out there, and the oil companies felt responsibility. There were pipeline breaks. Sometimes there were leaks at the wellhead casing. Simple things. To go out there it just takes somebody that can walk out of the office, go out there, see the site, look at the extent of damage—how many trees are involved and how many barrels are lost. The salt water is much worse than oil. There is much more devastating damage.

There were also clean-up and restoration efforts.

The BIA appraisals, if they were conducted, were tremendously, ridiculously low.

Senator DECONCINI. Let me ask Mr. Rice a question.

Mr. Rice, as Attorney General have you had to bring any litigation against the BIA or other federal agencies to fulfill the trust responsibility or to set aside any agreements that you felt were not in the best interest of your nation?

Mr. RICE. Not actual litigation as far as the Sac and Fox Nation to this point. They so far have tried to work within the agency system to try to get something done without litigation.

Now, as far as other tribes in Oklahoma, yes, sir, I have had occasion to bring a tort claim action against the United States because the Pawnee Indian Agency fouled up an oil and gas lease sale and simply refused or neglected—whichever you want to say—to publish the notices properly in the paper. They gave every oil company a free shot of seeing what each other was bidding on the leases, and the leases bid 30 days late came in anywhere from 50 percent on down of what the lease sales were on the first occasion.

Senator DECONCINI. I guess my question is: if what BIA is doing there so egregious—not that that is what you should do, because you should not have to do it—why havent you sued them?

Mr. RICE. Well, part of the problem revolves around resources that the nation has to keep itself alive and to bring those kinds of lawsuits and support them. You're talking about a staff of investigators, a staff of attorneys, and several other things. I'm it. We do what we can do.

At the same time, we are also—and this kind of revolves into some of the other problems that we have out there——

Senator DECONCINI. You have another practice, then, besides being Attorney General?

Mr. RICE. Yes, I do. I am an attorney in private practice and I represent several different Indian tribes in Oklahoma. I'm also the Chief Justice for the Citizen Band Potowatomi Tribe, and I'm also an adjunct associate professor of political science at the University of Oklahoma. So I have several hats that I wear.

Senator DECONCINI. You answered my question for me. Thank you.

Mr. ANDERSON. I have no further questions.

Senator DECONCINI. Mr. Canard, let me ask you the question: you have the company, Geotechnical Services. Are you a consultant to the tribe?

Mr. CANARD. YES, I AM.

Senator DECONCINI. And do they pay you directly?

Mr. CANARD. Yes. Under contract.

Senator DECONCINI. Under contract.

Mr. CANARD. I subcontract with the Tribe.

Senator DECONCINI. You subcontract with the Tribe. Yes, I understand.

Now, in the course of what you're doing—and I missed this because I was on the telephone to another Senator here, and so if you already gave this, please excuse me, but maybe you didn't. Can this salt-water problem that they have been participating in here be fixed? Is there a solution to that? You said it has been under—for 19 years they have been studying it and looking at it. If so, what do they do to fix it? Thirdly, do you have any idea what it would cost?

Mr. CANARD. It can't be fixed. The damage is extensive. It is beyond rehabilitation. And I want to give you a number here that we discovered in 1984. The oil companies have injected 63 million barrels of salt water into an area that covers a little more than 800 acres. As Mr. Welsh mentioned earlier, that would equate to a Valdez Alaska oil spill about once every year, when you consider the volume. It has to be replaced. It can't be corrected.

Senator DECONCINI. You mean the salt water has to be pumped out?

Mr. CANARD. No; I mean the fresh water—the water supply has to be replaced?

Senator DECONCINI. That means you have to bring it in from some place else?

Mr. CANARD. Or replace the land.

Senator DECONCINI. Yes. There is no rehabilitating this land by any corrective measures for what has happened with the pumping of salt water into it; is that correct?

Mr. CANARD. That's true. I did mention earlier that there is a short-term method here to get water for economic development, and by short-term I mean 25 to 30 years, and that is to bring it in from five miles away, buying water rights, building a treatment plant and water pipeline and crossing a river to get there, but that's just short term. The long term——

Senator DECONCINI. So the land has really been ruined——

Mr. CANARD. Yes, sir.

Senator DECONCINI [continuing]. For any economic development?

Mr. CANARD. Yes, sir.

Senator DECONCINI. I guess maybe you could build on top of it, but for anything that would use the land, itself, it has been ruined.

Mr. CANARD. That's true.

Senator DECONCINI. And payment for that has been primarily the leases or whatever BIA agreed to, and then the dispute as to what the tribe thinks the settlement should be for those damages? It seems to me—please correct me somebody—even the tribe's in-

creased settlements seem very minor for the loss of acreage that can never even be rehabilitated.

Mr. CANARD. Yes, sir; we see that. And this has been known for such a long time—years now. The study that I have done here is just a review of all the other studies that have been done for the last 19 years, and I think that this is a classic example at the top of the ladder of non-management by the Bureau of Indian Affairs.

Senator DECONCINI. Thank you, gentlemen. That is a tragic story, and only one more and one of the worst ones, to lay at the door of the BIA, maybe of Congress too, for somebody is certainly doing one lousy job in protecting the interest of the Sac and Fox Nation.

Thank you very much.

Mr. MANATOWA. Thank you for taking the time to hear our story. We appreciate it very much, and I thank you on behalf of the whole Sac and Fox Nation. This is a story that we have wanted to tell for many years. We have tried on various occasions to various agencies. Thank you very much. We want to show you what we can do with fresh water. Thank you.

Senator DECONCINI. I hope you get a chance to.

Next we have Joe Walker and Timothy Vollmann.

[Witnesses sworn.]

STATEMENT OF JOE WALKER, ASSISTANT AREA DIRECTOR, ANADARKO AREA OFFICE, BUREAU OF INDIAN AFFAIRS, ANADARKO, OK

Mr. ANDERSON. Mr. Walker, we'll start with you. What is your background? How long have you been with the Bureau of Indian Affairs?

Mr. WALKER. I've been with the BIA since 1963.

Mr. ANDERSON. And where did you begin at the Bureau of Indian Affairs?

Mr. WALKER. Riverside Indian School, Anadarko, OK.

Mr. ANDERSON. And have you been in the Shawnee Agency, as well?

Mr. WALKER. Yes; I went to the Shawnee Agency in 1968.

Mr. ANDERSON. And how long were you there, sir.

Mr. WALKER. Until June 1988 with some extended details out of that.

Mr. ANDERSON. And where are you currently?

Mr. WALKER. Anadarko area office.

Mr. ANDERSON. You've heard the testimony of the Sac and Fox Tribe about this problem. Basically, to summarize that, it has been a BIA mismanagement problem. Would you agree with that?

Mr. WALKER. I would not agree with everything that was said today.

Mr. ANDERSON. Would you agree that the government has done a fully sufficient job of protecting the resources here?

Mr. WALKER. I would like to take a look at some of the specific incidents.

I was greatly surprised by the allegation of fraud in appraisals. That is a criminal offense. I look forward to getting with them and seeing the evidence so it can be pursued as a criminal matter.

Mr. ANDERSON. And does your office have responsibility for monitoring these type of appraisals?

Mr. WALKER. All appraisals in the Bureau of Indian Affairs, regardless of whether they are done in-house, by contract, by a tribe, or by the company that is desiring the action through a contract, come to the area review appraisers and are reviewed and approved by the area review appraiser before they go back and become a document that can be used by the superintendent.

Mr. ANDERSON. Is it your understanding that, at least at the Sac and Fox Tribe, that the appraisals haven't been done correctly?

Mr. WALKER. Can you repeat the question.

Mr. ANDERSON. At the Sac and Fox Nation, have the appraisals been done properly, in your view?

Mr. WALKER. It was my understanding that they had been until what Mr. Welsh testified to today, and that is something that I certainly want to look into, because it is a very serious matter.

Mr. ANDERSON. Sir, with regard to contamination of the water, would you agree that the fact that there is contamination there is a failure of the government's trust responsibility?

Mr. WALKER. I don't know if it is a failure of the government's trust responsibility or not.

Mr. ANDERSON. Do you agree that it has happened, but it is not a failure of the responsibility of the government to protect the resources?

Mr. WALKER. I don't know, because we're talking about oil activity that started in the late 1920's. We're talking about a water flood operation that started in 1952, and here it is 1989. Technology is different today. Equipment and supplies and material are different today. So some of the things that probably were done in 1952 would not be allowed to be done today.

Mr. ANDERSON. In your view, the BIA then has protected the resources in that area?

Mr. WALKER. I would like to think that we have protected the resources to the best of our ability with the resources we had. Yes, sir.

Mr. ANDERSON. Even though there has been a failure to proceed with the cleanup on them?

Mr. WALKER. On the cleanup, you're talking about the alleged contamination of the aquifer?

Mr. ANDERSON. Sir, you use the word "alleged." Is there a doubt in your mind that that's not contaminated?

Mr. WALKER. No; there is not a doubt in my mind that it is contaminated, but who is responsible is unknown.

Mr. ANDERSON. Now, with regard to the chronology of the litigation here, the tribe is left with pursuing damages as their remedy; is that right?

Mr. WALKER. We're pursuing with this under a statute of limitations case which we initiated the notices to the public, individual allottees, and tribes in 1977.

Mr. ANDERSON. And a case has not been filed since 1977; is that right?

Mr. WALKER. Nothing has been filed in court as of this date.

Mr. ANDERSON. Has anything been filed—where else have filings occurred if not in court?

Mr. WALKER. Well, there have been draft complaints that have actually been drafted by the Department of Justice in the past, but they've never been filed.

Mr. BALLEN. Draft complaints from 1977?

Mr. WALKER. No; some draft complaints in the 1980s. At least one.

Mr. BALLEN. When?

Mr. WALKER. I'd have to look at my file, but——

Mr. BALLEN. Are you talking early 1980s?

Mr. WALKER. I think we're talking about 1984 or 1983.

Mr. BALLEN. And we're now in 1989 and those complaints have been sitting around in draft form for 5 years?

Mr. WALKER. That is basically correct.

Mr. BALLEN. How can they possibly sit around in draft form for 5 years? Can you give me an explanation?

Mr. WALKER. I believe in this particular case, Mr. Ballen, it was drafted because the statute of limitation law was about to expire. So the complaint was drafted, and——

Mr. BALLEN. But if they're not filed, that's not going to total the statute of limitations.

Mr. WALKER. Yes; but legislation was passed extending the statute of limitations.

Mr. ANDERSON. All right, sir, in terms of litigation support data you have generated, you have heard a report that it was generated first in 1979 to support this case. Why hasn't a lawsuit been brought since 1979?

Mr. WALKER. Well, part of the difficulty is that it is a very torturous process a federal agency has to go through to ultimately get into federal court. I assume any federal agency—at least in Interior—the professionals or the employees of the organization do their field work. That is sent to our Solicitors, who review it. It may come back to the professional that worked on it for additional information.

The Solicitor's Office then sends it forward to the Solicitor of Interior, and from there it goes to the Department of Justice.

The Department of Justice then decides what is going to happen to it.

Mr. ANDERSON. You mentioned the torturous process here. Does that justify a 9-year delay since this data was developed in 1979?

Mr. WALKER. It may in this particular case, Mr. Anderson.

Mr. ANDERSON. So you feel that the delay in bringing the lawsuit is fully justified in this case?

Mr. WALKER. No; I did not say that it was fully justified, but I said it was entirely possible. Each attorney up the the line wants to look at it a little differently.

Mr. BALLEN. It is possible and, in fact, it has happened, hasn't it?

Mr. WALKER. Yes; it has.

Mr. BALLEN. It's more than possible?

Mr. WALKER. Yes; it is.

Mr. BALLEN. The question is: Is it in any sense excusable? That's more the question, not whether it is possible or not. It is obviously possible, because 9 years of delay have happened here.

Mr. WALKER. As I said earlier, though, this is a very complicated case going back to 1926. To find out exactly the cause and exactly

who is responsible, I assume the attorneys up and down the line want to be very sure of their act before they take that first and crucial step.

Mr. ANDERSON. Let me ask you: In your lead role as the person who is protecting the resources here, aren't you angry or outraged at all that this has occurred and that this delay has been in effect?

Mr. WALKER. I'm a little upset. Yes, sir. But I know that complicated things take a long time.

Mr. BALLEN. I guess I haven't been a lawyer all that long, but 9 years to examine a case must be awfully complicated. The Supreme Court examines lots of cases and lots of complicated issues every day and passes on them. I can't imagine that a case would take 9 years and be that complicated to proceed on.

Mr. WALKER. In looking through the file, Mr. Ballen, the Bureau has paid for five studies and EPA has paid for one. In almost all the cases I have examined, including the last one, they come right up to the point and say "it appears," "it is probable," but I have yet to see one of these studies that says, "So and so is guilty of this because on a certain date he did such and such." I haven't seen that. I think that's what the attorneys are looking for before they more forward.

Mr. ANDERSON. Now that I guess you have acknowledged here today that you are a little upset about this issue, can we expect that at some point this litigation is going to be put together?

Mr. WALKER. At the present time Tim Vollmann's office in Tulsa is evaluating, along with the hydrologist from the BIA in the Billings area, the latest study that was done. We know that we'll probably have to do additional studies, but, as I said, this is number six that we have done. We are hoping before we get the next study done that all the attorneys up and down the line are in agreement that this is our final shot—this is going to be good enough.

Senator DECONCINI. Excuse me. I have not had the benefit of reading the studies. Are these investigations, or are they studies? Do you send criminal investigators?

Mr. WALKER. No; these are not criminal. These are mostly people that are skilled in examination of underground contamination.

Senator DECONCINI. I see. Do you send any other types of investigators to see how this happened and who was responsible for it?

Mr. WALKER. Well, BLM has been involved off and on over the years in some of this, sir.

Senator DECONCINI. I guess I'm a little bit dismayed that it seems to be rather casual on your part that we've had five studies and now we're going to do another one. If I were you—and I'm not, obviously—I'd really want to know what the hell is going on, and I'd want more than just a study. I'd want a pretty big investigation. If I had to go to the Solicitor or the Secretary's office and say, "I need some help to get to the bottom of this," do you feel it is of that nature?

Mr. WALKER. At this point, sir, I just do not see anything to indicate that it is a criminal offense. If I did, I assure you I would have reported it long ago.

Agent Elroy on your staff can testify to the fact that I do not hesitate to report criminal incidents.

Senator DECONCINI. I'm glad to hear that. Let's assume, then, that it is not criminal for the purposes here, and it is a question of getting to the bottom of who is responsible and what can be done to cure it. Nine years just seems to me to be awfully hard to accept as any reasonable amount of time to figure how to approach to how big a problem you had.

When we spilled all the oil in Alaska it didn't take nine years to get up there and get after it. I realize there is a great distinction here——

Mr. WALKER. No; but it may take nine years to clean it up.

Senator DECONCINI. I don't think it will. It may, but I would be very surprised, and I suspect there would be committee hearings that would be very critical of Admiral Yost and others who are involved in that clean-up if it took nine years, including the oil company. I suspect that that clean-up will be accomplished or there will be at least evidence that absolutely everything has been done to accomplish it, in the next year or two. I don't get that feeling that is what has happened here, based on the testimony. I'd love to be corrected. But you feel everything is being done to——

Mr. WALKER. One thing that happened was that the Field Solicitor's office at Anadarko was closed in 1983, so all the case work that had been done from 1977 up until 1983 was boxed up and transferred to the regional field solicitor's office in Tulsa.

They had some problems in the Tulsa Regional Field Office. Mr. Vollmann came to the Tulsa Field Office I believe in the fall of 1987. It took him a while to get his staff organized and get people hired and get cranked up. So we have a period there of 3 years that probably, in my opinion, if fault is to be placed any place, would be placed at the fact that the field office had to be closed.

Senator DECONCINI. And I don't lay that on you, but what did you do about that? Did you go hammer on your supervisor's office and tell him, "Hey, we've got a big problem here."? Did you go to the Secretary and say, "I've got a big problem. You closed this office and I can't get this case done." Did you do anything to——

Mr. WALKER. There were numerous inquiries made asking for the status of the cases. We had a number of cases there that have been there a long period of time.

Senator DECONCINI. So there were inquiries about this case?

Mr. WALKER. Yes.

Senator DECONCINI. And do you have those dates?

Mr. WALKER. I don't have them with me.

Senator DECONCINI. Will you supply those for us, please, as to how many times during that 3 years you made those inquiries regarding the status of those cases, and what answers, if any, you got back.

Mr. WALKER. Yes, sir.

Senator DECONCINI. Mr. Anderson.

Mr. ANDERSON. Just to clarify that, you said there was a period of time when these files were lost; is that right?

Mr. WALKER. No. I'm not saying they were lost. I'm saying that when the field solicitor's office in Anadarko was closed in about 1983, the records in that field office were all boxed up and transported to the Tulsa Regional Field Solicitor's Office.

Mr. ANDERSON. And the boxes——

Mr. WALKER. It took them a while to go through their boxes.

Mr. ANDERSON. And that's when you were making the inquiry to find out the status?

Mr. WALKER. Yes.

Mr. ANDERSON. And was the answer that the files were boxed up?

Mr. WALKER. Well, I'm not sure. I wasn't involved at the case at that particular time, but the staff people tell me that they did make inquires.

Mr. ANDERSON. I have no further questions, Mr. Senator, of this witness.

STATEMENT OF TIMOTHY VOLLMANN, SOUTHWEST REGIONAL SOLICITOR, DEPARTMENT OF THE INTERIOR, TULSA, OK

Mr. ANDERSON. Mr. Vollmann, you've heard the testimony today. My understanding is that you're fairly new to the Southwest Regional Office; is that correct?

Mr. VOLLMANN. Yes; I was assigned there permanently in the fall of 1987.

Mr. ANDERSON. And in reviewing the files and case loads of that area office, did this case come to your attention?

Mr. VOLLMANN. It was called to my attention in January 1988 when the BIA basically told us that the tribe was interested in determining what the status was of any progress in pursuing this claim.

No one on my staff at that time was familiar with it at all. We pulled the files. We found the files. At that time I saw no evidence of any activity on the claim since the closing of the Anadarko Field Solicitor's Office, and I suggested to the BIA that we convey our apologies to the tribe for the inaction.

Mr. ANDERSON. How long a period of inaction was that, Mr. Vollmann? You said since the closing of the Anadarko Field Office?

Mr. VOLLMANN. The Anadarko field office was closed in February 1984.

Mr. ANDERSON. So there was no action from February 1984, until January 1988, when you had a chance to look at this again; is that correct?

Mr. VOLLMANN. I didn't see any evidence in the file that I obtained.

Mr. ANDERSON. Thank you.

You've heard the testimony also about the delay here. Do you feel that the government has moved as quickly—we heard testimony of a torturous process, but has it moved as quickly as it should have been in this case?

Mr. VOLLMANN. When I testified before the committee in February I went through the process that is involved in preparing a litigation report and how decisions are made in that. That's in my statement and in my testimony of last February.

I am comfortable saying that we can do better than what we have done on this, and that I plan to see that we move this claim towards the court house.

Mr. ANDERSON. Mr. Vollmann, this isn't the only case that is in your office that is of this nature; is that right? Are there other natural resources types of things?

Mr. VOLLMANN. Yes; this is the only salt-water contamination case I think we have, but we have many natural resource cases. Yes.

Mr. ANDERSON. And how can we improve this process in terms of developing these litigation reports?

Mr. VOLLMANN. I have a couple of thoughts on that. They are my own thoughts. I'm not speaking for the Department.

First of all, within the Solicitor's Office the attorneys for the Secretary, in this case as his capacity as trustee, when we ask the Bureau of Indian Affairs for technical reports for the development of evidence that would support our litigation reports so that when we go to court we win, or have the best possible opportunity to win, that we give them detailed information on what we need.

I have seen evidence that we haven't done that, and it is certainly my intention that we give them the best possible advice up front instead of just bucking the matter back to the BIA and saying we don't have sufficient information to support a litigation report.

Secondly, I believe that when the Bureau lacks the expertise in a particular natural resource area and thus has to go outside the Government to contract to obtain the information, which is very common for many agencies, that when it lets a contract, and/or when the tribe, if it gets the contract and then subcontracts, that these contracts should be run by the Solicitor's Office so that we can review the scope of work to make sure that we are getting what we need to pursue the litigation. That hasn't always been done, and it is my personal view that we need to build in procedures to make sure that that happens.

If, in fact, the expectation is that if attorneys for the United States are going to bring this suit as trustee, we ought to be involved in the decisions made to develop the evidence to prove our case.

Mr. ANDERSON. Have you taken any steps recently to develop that process and to train the area offices of BIA in how to bring litigation cases.

Mr. VOLLMANN. Yes; in fact, just last week we were in Anadarko—two attorneys from my staff were in Anadarko conducting offensive litigation. We've done this at other BIA offices in my region and other agencies or the department, and there is a lot more that needs to be done, and we do intend to pursue this.

I think the coordination as far as litigation goes needs improvement. I would like to see that I'm working hard towards that end.

Mr. ANDERSON. Is most of the litigation you bring defensive type litigation rather than offensive? Defending claims, rather than bringing claims?

Mr. VOLLMANN. I think probably nationwide that would be true. It is hard to characterize in our office since we have special duties under a special federal law that requires us to appear in State court on behalf of Indians of the Five Civilized Tribes—and those cases are our most common, and they don't fall into any particular category—offensive or defensive.

Mr. ANDERSON. Mr. Chairman, I have no other questions other than to note that at least in my investigation, the recent efforts do seem due to Mr. Vollmann's taking on these activities that he just mentioned of litigation reports and pursuing offensive litigation.

Thank you.

Senator DECONCINI. Mr. Vollmann, how long have you been in the Southwest Region Soliciator's Office?

Mr. VOLLMANN. I've been the regional solicitor since the fall of 1987. I was detailed there as a temporary measure in April 1987 and was asked to focus on the work of the trial attorneys representing Indians of the Five Civilized Tribes, and so I was there in the spring on detail from here in Washington where I had worked previously.

Senator DECONCINI. Just out of curiosity, is there a reason they are referred to as the "Civilized Tribes"? Are there uncivilized, or has it been going on for a long time?

Mr. VOLLMANN. I have to think that's the white man's term. I don't hear the tribes call themselves that.

Senator DECONCINI. It seems to me like we ought to strike that term, in my opinion.

Mr. VOLLMANN. It is in Federal statutes, which is a bad idea.

Senator DECONCINI. I'd like to see it taken out.

Let me just ask you this: How many lawyers do you have working for you?

Mr. VOLLMANN. In Tulsa I have eight lawyers and one paralegal, not counting myself.

Senator DECONCINI. And what kind of case load do those lawyers have?

Mr. VOLLMANN. We are very busy. In the trial attorney work that we do for the five Civilized Tribes in eastern Oklahoma we get an average of about 10 oil and gas leases per month that results in at least one hearing in State court, in addition to working with appraisals and with the Indian landowners.

We also get——

Senator DECONCINI. Excuse me. Are those cases settled within the month, or——

Mr. VOLLMANN. Most of them are settled within the month. Many of them, however—a minority, but not an insignificant minority—involve prolonged hearings.

Senator DECONCINI. What percent would you say go on?

Mr. VOLLMANN. Perhaps one-quarter of them would stretch out for over 1 month.

Senator DECONCINI. So just in that area alone you get 120 cases or more a year, and some 30 or so are prolonged and your staff has to work on those cases.

What other kinds of cases?

Mr. VOLLMANN. We handle defensive litigation. When the United States is sued we prepare litigation——

Senator DECONCINI. So how many cases would you estimate are active, ongoing cases like today or the first of the month or the first of the year?

Mr. VOLLMANN. Active cases that we are presently working on with U.S. attorneys, we probably have 20 active cases in Federal court. And then we have our State——

Senator DECONCINI. How many open files, then, would you say you have?

Mr. VOLLMANN. I would hestitate to even guess at that. There are a lot of cases that have been sitting around for a long time.

Senator DECONCINI. Would you guess that it is in the hundreds?

Mr. VOLLMANN. As far as Federal court litigation, that seems high.

Senator DECONCINI. No, all cases.

Mr. VOLLMANN. Well, if you consider matters that are not the subject of litigation and where we have had requests, yes, no question. We have hundreds of matters that we are working on right now.

Senator DECONCINI. So it is safe to say that your lawyers have a heavy load; is that correct?

Mr. VOLLMANN. My lawyers tell me they have a heavy load. Yes. We're very busy.

Senator DECONCINI. Do you believe that to be the case, too?

Mr. VOLLMANN. Yes; I do. Part of that is my doing, I think. I go around to the agencies and I say, "What can we do for you?" And then when they ask us to do too much, I tell them they have to prioritize. They don't like that.

Senator DECONCINI. Do you have enough lawyers to do the necessary work in the Solicitor's Office that you are in charge of?

Mr. VOLLMANN. It is always tempting to say that you need more lawyers. I think a lot of the problems we deal with, throwing more lawyers at the problems isn't the solution. I think a lot of the training that we are doing with the agencies will reduce the need for having more Government lawyers if we can get people in the agencies—non-professional people—to understand what it is that we, as lawyers, need to give them the best possible service.

Senator DECONCINI. So you're saying if there were better management or better operations you might have less call on the Solicitor's Office?

Mr. VOLLMANN. We can improve coordination with the agencies, and we're working towards that end.

Senator DECONCINI. Do you find the agencies make a lot of mistakes that you have to defend or take on or find a solution?

Mr. VOLLMANN. That is the plight of Government lawyers, I'm afraid. Yes.

Senator DECONCINI. Thank you very much, gentlemen, for your testimony.

The committee will stand in recess until 10 a.m. Thursday morning. We will not be in session on Wednesday morning. Thank you.

[Whereupon, at 4:18 p.m., the committee was recessed, to reconvene at 10 a.m. on Thursday, May 18, 1989.]

APPENDIX

Additional Material Submitted for the Record

TESTIMONY OF RICHARD BALDES

My name is Richard Baldes. I am Project Leader at the Lander, Wyoming Fish and Wildlife Management Office of the U.S. Fish and Wildlife Service. I am here today in answer to a subpoena from this committee and with the approval of the Fish and Wildlife Service. I am presenting my testimony today on the Federal Government's management of the water resources and its impacts on the fishery resource at the Wind River Indian Reservation.

I have been employed by the USFWS as a Project Leader at the Wind River Reservation since 1972. As Project Leader, I have responsibilities for managing both fish and wildlife resources on the Wind River Reservation. I have a B.S. degree in wildlife management from the University of Wyoming and a M.S. degree in fisheries from Colorado State University.

I am very proud that our Lander, Wyoming office received an award from the Department of Interior in 1987. This award was received a result of the Department's "Take Pride in America" competition in which the Lander office engaged in a cooperative effort with the Shoshone and Arapahoe Tribes, the Wyoming Game and Fish Department, the Bureau of Indian Affairs and local schools to transplant antelope into their historical range. The "Take Pride in America" award is one of the top five awards of the USFWS. As a result, I participated in an awards ceremony at the White House in 1988.

FISHERIES MANAGEMENT - At Wind River - My testimony today is based on 16-1/2 years of experience in managing fish and wildlife resources on the 2.2 million

acres at the Wind River Reservation. We manage a variety of native species of fish which include freshwater burbot (also know as ling), cutthroat trout, whitefish, sauger, suckers and several species of minnows. We also manage and have excellent fisheries consisting of rainbow, brown, golden, lake and brook trout. The servation includes some of the highest quality fish habitat left in the United States. There are 265 high mountain lakes and some large reservoirs in the lower elevations that contain good to excellent fish habitats. In addition, there are over 1,100 miles of rivers and streams, most of which are high quality trout streams.

The government entities that plan a role in managing fish resources at the reservation include the Shoshone and Arapahoe Tribes, the U.S. Fish and Wildlife Service, the Bureau of Reclamation (BR), the Bureau of Indian Affairs (BIA), the Environmental Protection Agency (EPA), the Army Corps of Engineers, and the Public Health Service.

The Bureau of Reclamation is primarily responsible for the management of water in conjunction with the Midvale Irrigation District at Bull Lake, Bull Lake Creek, and the Diversion Dam located on the Wind River. The Bureau of Indian Affairs is actively engaged in the management of several major canals: Dinwoody, Johnstown, Lefthand, Ray, Coolidge and sub-agency canals. In conjunction with those canals, BIA uses Lower Dinwoody Lake, Washakie Reservoir and Ray Lake as irrigation storage reservoirs.

3.

The Bureau of Reclamation and Bureau of Indian Affairs management of these water sources has resulted in circumstances which have led to severe impacts on the fish populations and their habitats at the Wind River Reservation. The number one area of concern would be the Bureau of Reclamation's management of Bull Lake Reservoir.

BULL LAKE - The Bureau of Reclamation and the Midvale Irrigation District regulate water use in Bull Lake. The USFWS has recommended a minimum pool level to protect fisheries in Bull Lake; however, the Bureau of Reclamation does not recognize the U.S. Fish and Wildlife Service recommendation for a minimum pool. A minimum pool is a level of water in a reservoir that must be maintained at all times (see schematic). From a fisheries standpoint, it means the different between have an excellent fishery (and maybe in the case of Bull Lake, on of the best fishing reservoirs in the State of Wyoming) and a marginal fishery. In Bull Lake, because of the lack of an identified minimum pool, there are times when the Bureau of Reclamation (Midvale) reduces the reservoir to extremely low levels. For example, last fall Bull Lake was drawn down to its lowest level in 47 years, to less than 26,000 acre feet of water. When full, the reservoir's storage capacity is a little over 152,000 acre feet. When these drastic drawdowns occur, below 46,000+ acre feet, studies we have conducted show we lose all natural spawning of any species. In addition, the other species of trout in Bull Lake (brown, rainbow and cutthroat trout) are unable to migrate upstream to spawn. When fish are prevented from spawning in

the lake (Lake Trout and Ling) and in the stream, the fishery can no longer sustain itself.

The impact on the Fishery also affects the revenue of the Tribes. Because of such low water levels last year, it was necessary for the Fish and Wildlife Service to recommend to the tribes that they close the fishing season early. We also recommended that the ice fishing season be closed (also in 1985), and that it be closed at the present time, since the level of Bull Lake April 1st was only 28,219 acre feet. It is still closed to fishing and may not be open at all this year.

In addition, because the levels of Bull Lake were so low, the Fish and Wildlife Service could not plant about $35,000 worth of fish. We had 100,000 Kamloop rainbow trout (which we requested 3 years ago) scheduled to plant in Bull Lake last fall that had to be stocked elsewhere.

FISHING POLICY - The Bureau of Reclamation has a fishing policy that presumably applies to this lake, but apparently is not being implemented. Billings Bureau of Reclamation officials, however, have not discussed this document with us.

BULL LAKE CREEK. The U.S. Fish and Wildlife Service is also concerned with the lack of instream flow in Bull Lake Creek below Bull Lake Dam (see schematic 2).

5.

The Bureau of Reclamation and Midvale Irrigation District regulate the flows to Bull Lake Creek (from Bull Lake) which at times have been over 700 cfs only to drop to 34 cfs within a day or two. These types of fluctuating stream levels are devastating to both fish and their habitats for three main reasons. First, it destroys productivity in the stream (algae and insects) and second, it strands fish in pools. If left without flowing water and some cover, the fish eventually die. The third problem with fluctuating stream flows occurs during or after fish spawn. Fish eggs or newly hatched fish are left without water. For example, brown trout normally spawn about the second week of November in Bull Lake Creek. In November 1983, the flow was 66 cfs. It was dropped to 33 cfs 4 days later. Within 42 days of spawning, the flow in Bull Lake Creek was decreased even more to 22 cfs.
This effectively eliminated an entire year class of fish.

DIVERSION DAM - Diversion Dam is located on the Wind River. The Bureau of Reclamation and (Midvale) divert all their irrigation water for the Riverton Reclamation Project at this point. Water is diverted through a large canal that has the capacity to carry up to 2,200 cfs. It is not unusual to have 1800-2000 cfs diverted for much of the irrigation season. As a result of the Bureau (Midvale) operations, two major problems exist with manipulation of water at Diversion Dam. One is that most of the Wind River is diverted into Wyoming Canal at this point. The second problem is a result of silt deposition behind Diversion Dam. The Bureau of Reclamation feels they must flush (sluice) the

silt out periodically (once or twice per week) in an effort to reduce the amount of silt flowing into Wyoming Canal at an annual cost of $100,000.

The Bureau (Midvale) must pass some water downstream for other irrigators. Most is taken out within a few miles below Diversion Dam by LeClair Irrigation District (private) and Johnstown Irrigation District (BIA). Between Midvale and other users, the river between Diversion Dam and Riverton is often almost entirely de-watered. At times, up to 98 percent of the water is gone in a 40-mile distance. In fact, the week of May 11, 1989, the Wind River below Riverton Valley Irrigation District was completely dried! The result is a loss of most of the fish habitat through drying or elevated temperatures no longer tolerable to trout, sauger, ling and walleye.

It is difficult to determine which is worse, the de-watering of the river or the sluicing of silt. There is no doubt, however, that the combination of the two has resulted in almost total devastation of game fish populations and their habitats for most of the Wind River between Diversion Dam and Boysen Reservoir (approximately 60 miles).

BUREAU OF INDIAN AFFAIRS (BIA) - The BIA is responsible for irrigation diversions on the South and North Forks of the Little Wind River, the Little Wind River and the Wind River. They are also responsible for diversion of water from Lower Dinwoody Lake, Washakie Reservoir and Ray Lake.

Several problems exist with water manipulation by BIA:

1. Records an amount of water diverted for irrigation purposes have never been kept on the Wind River Indian Reservation. It is conceivable that the amount of water diverted exceeds that is necessary for the amount of irrigable lands on the reservation. If that is the case, then instream flows recommended by the USFWS may be possible (at least on some rivers and streams).

2. Even though USFWS has recommended instream flows for all major rivers and streams, a constant monitoring of these is necessary by biologists to insure that a flow is diverted to at least keep fish alive. We have received considerable opportion from BIA for this activity, particularly on the Little Wind River and Dinwoody Creek.

3. Minimum pool levels in Washakie Reservoir and Ray Lake have been completely abandoned. In many years they draw down Washakie Reservoir to levels where a pool exists only in front of the dam (a few acres at best). When full, Washakie Reservoir is 3230 surface acres. Other than monitoring fish populations and on one or two occasions the planting of fish in the past, we have written Washakie off as a single purpose management reservoir.

4. Ray Lake used to a trophy trout fishery. Because of silt deposition, and primarily due to excessive drawdowns of the reservoir, it is no longer conducive to trout species.

Two landowners below Ray Lake have complained of excessive amount of water in Mill Creek below Ray Lake. One landowner has complained for many years. Again, the extra water flowing down Mill Creek could have been left in the Little Wind River.

5. Improper material for stream bank protection - BIA has taken action to protect the landowners property. However, the material used was the wrong type for bank protection. They attempted to put in some drop structures which consisted simply of a bulldozer pushing fine materials (dirt) into the stream. Neither the bank protection nor the drop structures will survive the irrigation season. This introduction of sediments into the stream has very negative impacts on fishery population and their habitats.

6. In the past, the BIA has been the main cause of river and stream habitat destruction. It was common practice for them (as well as most irrigators) to put their bulldozers in the rivers and channelize large segments of river - at times building high dikes (e.g., 10-12 feet high - 15-20 feet wide at base) to divert the river. Most of these efforts were wasted dollars and time. Because river bed material was used, the dikes usually did not last long. At times they used car bodies for rip-rap. Impact to fish? (The net effects were to destroy stream habitat with no effective water manipulation.)

7. In most BIA canals fish losses are considerable. This is especially true in Dinwoody, Ray and sub-agency canals. Thousands ofling, trout and other species of fish are lost through irrigation diversion canals each year.

ARMY CORPS OF ENGINEER - The Army Corps of Engineers (ACE) administers the Section 10. 404 Permit System, which requires a permit for any type of alteration of a stream 5 cfs or greater or a lake 5 acres in size or greater. The permitting process has become a "joke." Most of the destruction of fish and wildlife habitat is covered by exemptions in the law. The Corps no longer allows for adequate protection of fish and wildlife habitat.

COMMENTS:

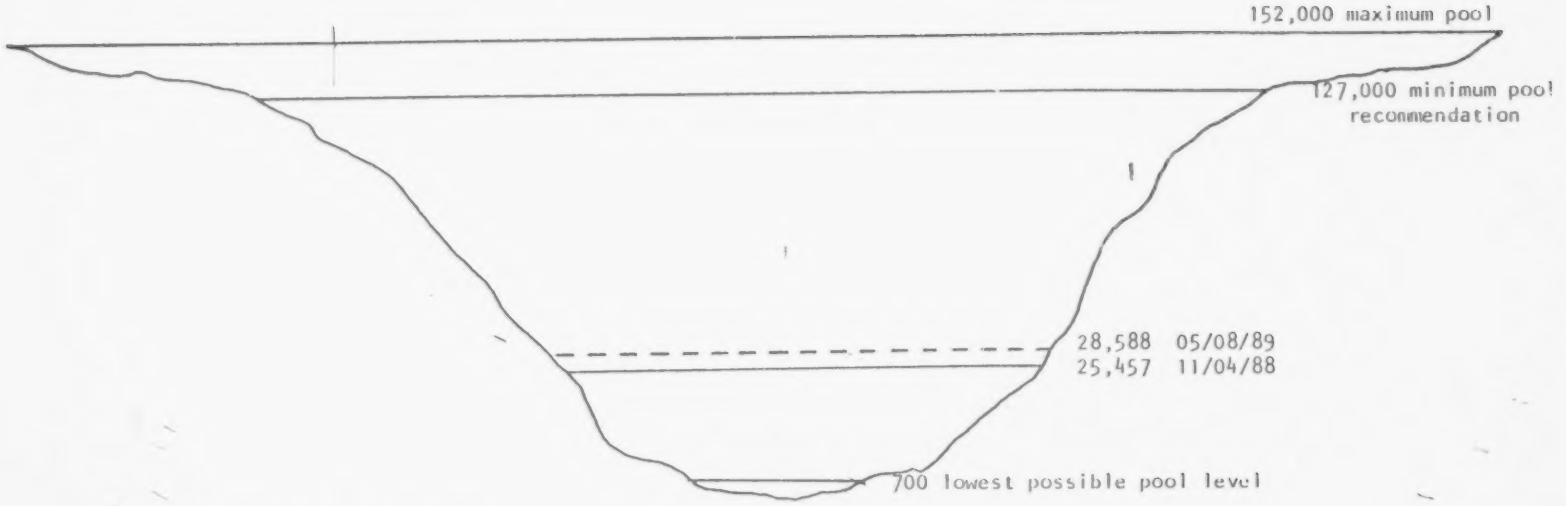
When it comes to irrigation, there seems to be a total disregard for other uses of water - particularly fisheries. For example, in the suit filed by the State of Wyoming against the Tribes over jurisdiction of water, the most contested use of water was instream flows - water for fish and wildlife and their habitats.

The fishery resource on the Wind River Indian Reservation is of tremendous value. It has not even come close to reaching its potential. It can be augmented greatly with more efficient use of water.

BULL LAKE

Pool Level

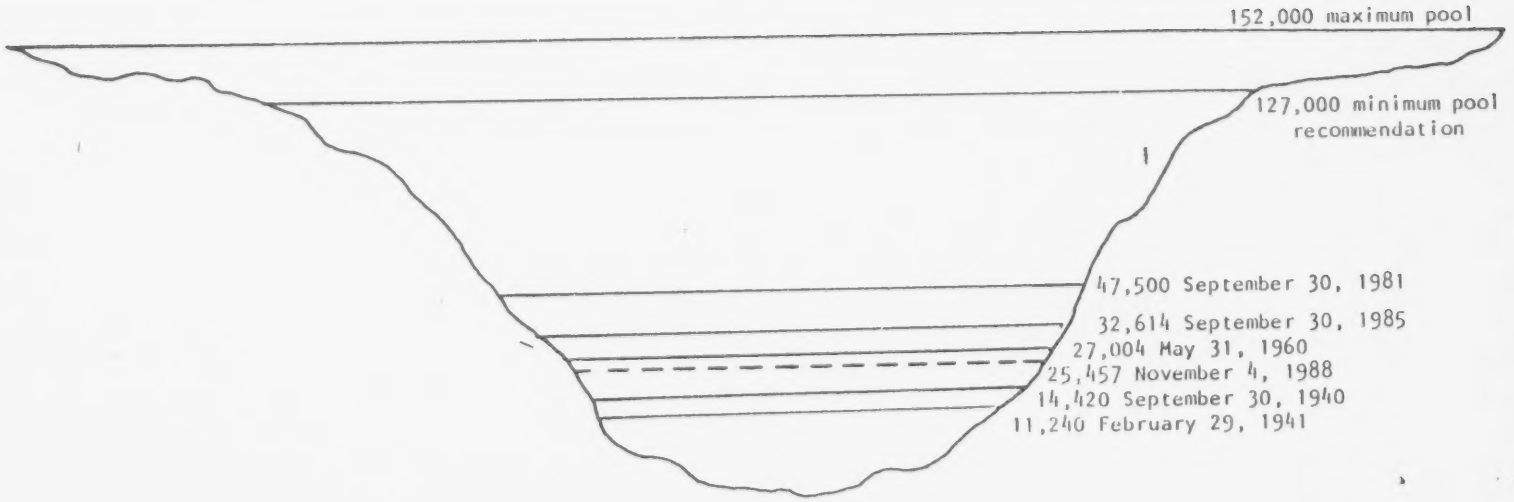
(acre feet)



BULL LAKE

Record Low Pool Levels

(acre feet)



RICHARD BALDES, FISH & WILDLIFE SERVICE, WYOMING

Order of Slides

SLIDE 1 Bull Lake -- nearly full, approximately 145,000 acre feet (1973)

SLIDE 2 Trophy ling from Bull Lake - February 1975

SLIDE 3 Bull Lake - 1985 - low water year, approximately 35,000 acre feet (April 1986)

SLIDE 4 Bull Lake Creek - a good flow - 262 cfs (1978)

SLIDE 5 Bull Lake - near dam - spawning and nursery habitat lost

SLIDE 6 Dyke below spillway - no 404 permit (Bureau of Reclamation and Midvale were going to let it wash downstream)

SLIDE 7 Bull Lake Creek - below bridge, approximately 1.3 cfs (May 1977)

SLIDE 8 Bull Lake Creek - stranded fish, 1.3 cfs (May 1977)

SLIDE 9 Bull Lake Creek - stranded fish dead, 1.3 cfs (1977)

SLIDE 10 Diversion Dam - Wind River - Wyoming Canal

SLIDE 11 Diversion Dam [note clear water]; 12 NTU's (nephelometric turbidity units)

SLIDE 12 Diversion Dam [note muddy water]; 41,000 NTU's, after sluicing (at least once a week -- 20 times that we know of in 1988)

SLIDE 13 Car bodies used by BIA to stabilize bank above left hand canal headgate

SLIDE 14 Little Wind River - Arapaho - car bodies not anchored

TESTIMONY OF JOHN WASHAKIE, CHAIRMAN,
SHOSHONE BUSINESS COUNCIL,
BEFORE THE SELECT COMMITTEE ON INDIAN AFFAIRS,
SPECIAL COMMITTEE ON INVESTIGATIONS,
UNITED STATES SENATE

MAY 16, 1989

Mr. Chairman, my name is John Washakie, and I am Chairman of the Shoshone Business Council. The Shoshone and Arapaho Tribes reside upon and jointly govern the Wind River Indian Reservation in central Wyoming. I am pleased to have this opportunity to testify concerning the administration of Bull Lake by the Bureau of Reclamation.

The Bull Lake system is located entirely on the Reservation. The origin of Bull Lake Creek is the Wind River Range. Approximately 210 square miles of Tribal land is drained by Bull Lake Creek and its tributaries and the drainage flows directly into Bull Lake. When full, Bull Lake is approximately 8 miles long, 1 mile wide, covers 3186 acres, and contains 151,951 acre-feet of water.

Bull Lake was authorized by an Act of Congress on March 14, 1940, (Pub. L. 431, 54 Stat. 49). The Act granted to the United States "a flowage easement and an easement for a dam site together with all rights and privileges incident to the use and enjoyment of said easements over tribal and allotted lands of the Wind River or Shoshone Indian Reservation . . . required for the construction of the Bull Lake Dam and Reservoir . . . and for the impounding of approximately [155,000] acre-feet of water including a ten-foot freeboard . . . ." A total of 1816.52 acres of land were acquired by the United States for the dam and reservoir project (89.37 acres were owned in fee, 127.15 acres were in divided Indian trust allotments, and 1600 acres were in Tribal ownership). These easements have been administered by the Bureau of Reclamation for irrigation purposes in the Riverton Reclamation Project (Midvale Irrigation District).

Research conducted in 1977 by attorneys for the Shoshone and Arapaho Tribes found that title remains with the Tribes and the individual allottees. The 1940 Act conveyed flowage and dam site easement rights only and provided that "the Reclamation Service will exercise control over the area only for purposes connected with the storage of water." The 1940 Act specifies that "[t]he easements herein granted shall not interfere with the use by the Indians of the Wind River or Shoshone Indian Reservation of the lands herein dealt with and the waters of Bull Lake Creek and the reservoir insofar as the use by the Indians shall not be inconsistent with the use of said lands for reservoir purposes." At no time since the creation of Bull Lake have the water rights of this drainage been transferred to the United States or the Bureau of Reclamation.

Bull Lake is the most important fishery resource on the Reservation. Mr. Weed has described for you the cultural and spiritual significance of Bull Lake, its waters, and the fish it supports. The Lake also supports species of game fish. Trophy size Ling and lake trout, upwards of 17 pounds and 30 pounds, respectively, have been caught at Bull Lake. Other species

in the Lake include rainbow trout, whitefish, longnose sucker, white sucker, and stonecat. Moreover, Bull Lake Creek, both above and below the reservoir, is designated by the State of Wyoming as Class I fisheries, the "Highest Value Fishery Resource." The upper area of Bull Lake and Upper Bull Lake Creek supports the largest and most important elk calving area in the Wind River Mountains, as well as being a wintering elk habitat. Bull Lake also supports goose nesting areas and bald eagle feeding sites. The potential also exists for nesting sites for the peregrine falcon, a Federal Endangered Species.

We allow fishing in both summer and winter on Bull Lake by Indian and non-Indian fishing permit holders. Bull Lake supplies a major number of non-Indian fishing permits on a year-round basis. These attributes, taken together with the value of the water itself, make this entire area a very valuable and important resource to the Tribes of the Wind River Reservation.

Unfortunately, the management of Bull Lake by the Bureau of Reclamation has recklessly endangered these resources. The Tribes have long sought a management scheme whereby Tribal fish, game, and water resources are insured adequate protection on a continual basis. What we have gotten instead are unnecessary and wasteful concessions to downstream irrigators, with conservation measures being taken only when convenient for the Bureau of Reclamation. Protection of Tribal resources has been sacrificed to the interests of downstream Midvale project irrigators, despite continuous Tribal objections. Two particular issues must be addressed. First, streamflows below Bull Lake Dam must be maintained at levels sufficient to protect the fisheries and prevent fish kills. Second, water levels in the Lake itself must be sufficient to provide adequate carrying capacity and to protect spawning/nursery habitats of lake species.

Recurring fish kills have been documented in Bull Lake Creek below the dam due to the large reduction in water flow at the end of the irrigation season. The minimal flow in lower Bull Lake Creek is aggravated by a diversion into a private ditch operated by non-Indians on fee land. This diversion has occurred in November, over one month beyond the end of the irrigation season. Although the Tribes have repeatedly advised the Bureau of Reclamation of this situation, the response has been to look the other way and plead ignorance.

The Bureau of Reclamation has consistently maintained that "there is no reservation of a right to control stream flows or reservoir water surface elevations" within the Bull Lake system and that the "operation must be such as to maximize project benefits." The Bureau has acknowledged that its obligations depend on the outcome of the Big Horn Water Rights Adjudication and the case is presently before the United States supreme Court for a final decision. This decision should settle the questions of instream flows within Reservation streams.

Our view, however, is that, regardless of the outcome of the Big Horn case, the Bureau of Reclamation has a trust responsibility to protect Tribal fish, game, and water resources. Moreover, any number of measures

are available to mitigate the impacts on fisheries of seasonal demands for irrigation water. Our experience with the Bureau, however, is that it is at the beck and call of the Midvale Irrigation District, and does nothing to regulate water use consistent with the preservation of fisheries resources. The Bureau responds to the demands of Midvale and disregards all competing interests.

As to the maintenance of water levels in the Lake, in 1988, the Wind River Reservation suffered prolonged drought conditions. Under these conditions, Bull Lake was drawn down to near record levels; a final estimate of remaining water within the Lake was 25,676 acre-feet. The Bureau of Reclamation maintained that it was meeting its legal obligations, despite the clear potential for devastating damage to the Lake's fisheries. The situation elevated into a confrontation between the Tribes and the Bureau of Reclamation in September, 1988. The Tribes maintained that Bull Lake could not continue to be drained, because of the detrimental effects on the Lake's resources. Unfortunately, the situation was misrepresented by the local media, further contributing to hostile relations between the Tribes and the Midvale irrigators.

Because of the fragile condition of the fisheries, the Tribes have closed Bull Lake to fishing by everyone except enrolled members to minimize damage to the fishery resources of Bull Lake. The extent of actual damage to fish habitat and populations is yet unknown; a study to address that issue will be necessary to document actual damage. A visual inspection of the Lake shows that habitat reduction was extensive. Ironically, through its wasteful management last season, the Bureau also has injured the Midvale irrigators. Because the Lake was drained so deeply last year, insufficient storage is available to meet irrigation demands. Thus, everyone will suffer. We are deeply concerned, however, that if the Bureau of Reclamation manages the Lake in 1989 as it has in the past, the damage will be irreparable.

The Tribes believe that management of Bull Lake and Bull Lake Creek for the benefit of Midvale irrigators does not have to result in the destruction of Reservation resources that has occurred in the past. The value of the Bull Lake system goes far beyond those to which the Bureau of Reclamation has responded in the past. Efforts to meet Tribal conservation goals have been minimal on paper, and even less in practice. The Shoshone and Arapaho Tribes of the Wind River Reservation are seeking positive action regarding a resolution to this situation that will afford them adequate protection of the Bull Lake system, a most important Reservation resource.

Mr. Chairman, that concludes my testimony. I would be happy to answer any questions you may have.

Wind River Indian Reservation
Summary of Tribal Concerns Regarding EPA's Activities

Prepared by the Wind River Environmental Quality Commission
P.O. Box 217, Ft. Washakie, Wyoming

This document summarizes some of the major concerns of the Shoshone and Arapaho tribes regarding the activities and policies of the U.S. Environmental Protection Agency in relation to the management and protection of the environment on Indian lands. The information described here is derived from direct tribal experiences with EPA Region 8 and is also obtained from a national meeting held in February, 1989 whose purpose was to discuss the experiences and record of EPA regarding the protection of Indian resources.

1. Context for Environmental Concerns at Wind River

The Wind River Indian reservation is a 2.1 million acre reservation located in west central Wyoming. The reservation has over 147 lakes, several hundred streams totaling more than 1,000 stream miles, and several large aquifers beneath its land base. As a result of its size and the nature of industrial and agricultural development on reservation lands, the reservation embodies a wide range of environmental problems that pose serious threats to the health and welfare of tribal residents and resources. For example, over 200 injection wells presently inject waste fluids into subsurface aquifers, many of which have less than 700 parts per million total dissolved solids (TDS). Injection activities are associated with the large scale oil and gas development in 5 major oil fields on the reservation; brine pits and waste disposal into reservation streams also pose problems. Another pending problem is high selenium concentrations in agricultural waste waters affecting reservation streams. With several Class I (or trophy) streams on the reservation supporting several different types of fish, non-point pollution sources form a major threat to tribal resources.

Finally, we mention the potential air quality problems existing on reservation, including acid rain impacting the high mountain lakes and a uranium tailings pile affecting radon concentrations in Arapaho communities.

The recent 1988 Wyoming State Supreme Court decision, which quantified the tribes' water rights, poses significant managerial challenges to the tribes: the tribes must develop policies and procedures to protect and manage this hard fought-for water. Seen in this context, EPA assistance was sought in the development of baseline data, underground injection controls and water quality standards.

2. Requests for Financial Assistance from EPA: The Record of Response and Action

In the last year, the Wind River tribes have sought funding from EPA through the various mechanisms outlined by the agency in its guidelines for implementing the agency's Indian Policy. The tribes submitted a proposal for Underground Injection Control funds under the Direct Implementation program of EPA in June 1988 and submitted a proposal for Section 106 funds in July, 1988.

The record of response of EPA to both these proposals has been dismal. First, with regard to the UIC grant, the tribes were told continuously that the monies were available, and that all that was needed was for EPA to complete the necessary internal paper work for this grant. At the time of submission of the proposal, there was no requirement for the tribes to prepare or submit the forms for the treatment as a state designation, inasmuch as the funding was to go directly to the Indian Health Service (IHS) and then to the tribes.

In February, 1989, EPA informed the tribes that the monies were to be made available shortly, however, in March 1989, EPA informed the tribes that there would be no grant in this area to the tribes. The reason given is that the tribes never applied for treatment as a state, and that this was a "requirement for direct implementation monies". When queried about this requirement, EPA officials sited the September 1988 federal register and its regulations regarding treatment as a state. When the same officials were asked why they did not inform the tribes about these changes so that any application could have been rewritten, the officials insisted that "it was not our jobs to inform you of these changes". In any case, direct implementation monies do not require the tribes to submit an application for treatment as a state.

With regard to the Section 106 proposal, EPA has not contacted any tribal agency or legal representative regarding its status. Additionally, as long as EPA drags its feet on the development and implementation of regulations that will allow tribes to qualify for 106 monies, no tribe will be able to move on the development of critically-needed water quality information.

In short, EPA has been particularly unresponsive to the needs and requests of the WRIR, the largest Indian reservation in Region 8. EPA's neglect and lack of assistance on the development of funding proposals borders on dishonesty and certainly reflects a lack of respect or concern for tribal environmental issues. The unfortunate aspect is that this general lack of response seems to be a pervasive characteristic of EPA.

These concerns were echoed by tribal representatives from 10 reservations who attended the February meeting sponsored by the Wind River Environmental Quality Commission. Among the most pertinent comments were those directed toward (a) lack of agency response, (b) lack of direct technical assistance to tribes, (c)

lack of effective communication, (d) misleading statements, false promises and lack of follow-up, and (e) the pervasively low level of funding for the development of tribal environmental programs.

3. Aquifer Exemptions

In November 1988, EPA exempted several aquifers on the Wind River Indian reservation from regulation under EPA's underground injection control program. Although many of the aquifers exempted are considered potable aquifers (with less than 500 ppm TDS), EPA exempted these aquifers based on the extensive oil and gas development in the region.

However, examination of the water resources information available for the Wind River basin would suggest that a blanket exemption of these aquifers was incorrect. First, the lateral extent of aquifers is significant and there are many areas in each of these aquifers that are potable and that would not be impacted by oil and gas activities simply because of their geographic location in relation to oil and gas activity areas. Secondly, the Wind River basin is characterized by extensive artesian pressures which make it entirely possible for improperly disposed of fluids to migrate to the surface and contaminate upper potable aquifers. Since many of the injection wells are actually converted production wells, the chemical reactions between the injected fluid and the well casing itself cause mechanical breakdown of the casing and thus provides an avenue for the migration of fluids. With over 456 drinking water wells located on the reservation, the potential threat to tribal water supplies is clear.

The tribes were never informed of EPA's action to exempt aquifers on the reservation from regulation, except by the notice in the Federal Register. Additionally, EPA has admitted that there was not enough information on ground water, well construction or injection activities in the basin to have made this decision (Tom Pike, EPA region 8). Finally, virtually no field work was conducted in the process of making the exemption decision.

4. Level of Funding for Tribal Programs

The level of funding committed to the development of tribal environmental programs is too low for effective program development. For example, the nation-wide funding for the development of a tribal clean lakes program is only $225,000; for the Wind River Indian Reservation, with over 147 lakes, this is wholly inadequate. The UIC program funding is also low, considering the nature of the process and the expense involved in sampling, testing wells and analysis. Nation wide funding for this program is less than $ 800,000 and is again wholly inadequate. Unless substantial funding is made available, the deterioration of tribal land, water and air resources is sure to follow. At this point, the tribes are given just about enough money to fail.

5. Summary

While this document has described only a few instances of tribal environmental concerns, it is important to recognize that many of the 300 tribes across the country face similar, if not more severe, environmental problems. The ultimate challenge before the tribes is the development of programs that protect and manage reservation resources for future generations. Without the financial and technical commitment of federal agencies, tribes will be severely handicapped in this effort. The state of environmental affairs on Indian lands necessitates immediate action and commitment on the part of EPA.

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WASHAKIE

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CHIEF
BLACK COAL

Wes Martel - Chairman
Environmental Quality Commissioner

Orville St. Clair
Environmental Quality Commissioner

Joseph Oldman
Environmental Quality Commissioner

Wayne Felter
Environmental Quality Commissioner

March 4, 1989

The Honorable Dennis DeConcini, Chairman
Special Committee on Investigations
Select Committee on Indian Affairs
United States Senate
ATTN: Michael Anderson
838 Hart Senate Office Building
Washington, D.C. 20510

Re: Environmental Protection Agency Indian Policy

Dear Chairman DeConcini:

I am the Chairman of the Wind River Environmental Quality Commission ("WREQC"). WREQC was established in 1988 by the Joint Business Council of the Shoshone and Arapaho Tribes to enforce tribal environmental laws on the Wind River Reservation. I am writing to thank you and the Investigations Committee for urging the full Select Committee to conduct oversight hearings on the Environmental Protection Agency's implementation of federal environmental laws on Indian reservations. I also ask your assistance in seeking amendments to the Clean Air Act and the Resource Conservation and Recovery Act ("RCRA") that would allow tribal governments to participate fully in the regulatory programs established by these acts.

The WREQC currently is working to address a number of serious environmental problems on the Wind River Reservation. We recently learned, for example, that lakes and streams in the Wind River Mountains are showing effects from acid rain, thereby endangering tribal fisheries. Our Reservation is pristine, and we hope to maintain its environmental purity for the benefit of future generations of tribal members. We lack the resources necessary even to study the scope of the problem, let alone establish a regulatory system for addressing it. Moreover, due to an Environmental Protection Agency ("EPA") determination that tribes are not eligible to receive grant funding under the Clean Air Act, and its refusal to approve tribal implementation plans for air quality management, tools for the protection of air quality that long have been available to state governments continue to be denied to tribal governments.

Similarly, our Reservation has a serious problem in disposing of solid waste. As you may know, the United States Court of Appeals for the Eighth Circuit recently held that tribal governments are responsible for managing solid waste disposal on reservations and may be held liable should they fail to meet this responsibility. At the same time, tribes currently were not eligible for the millions of dollars in solid waste management planning funds that the states have received over the years under RCRA. In other words, we are being held responsible for solid waste management to the same extent as state governments, but have never received the substantial federal assistance that state governments have used to address this problem.

Finally, tribes must be given the authority to regulate the handling, transportation, storage, and disposal of hazardous wastes on their reservations. EPA currently claims the authority to license and regulate hazardous waste facilities in Indian country with the tribes, presumably, playing no regulatory role. It seems fundamental that tribal governments should be making the decisions as to whether such facilities are to be located on their reservations, and should be the ones to establish and enforce standards governing the operation of such facilities. The need is clear for tribal governments to assume primary regulatory authority for environmental matters on their reservations. Neither RCRA nor the Clean Air Act allow such tribal regulation in the view of EPA lawyers.

Attorneys for WREQC recently met with members of your staff, members of the Environment and Public Works Committee staff, and EPA officials and discussed the necessity of amendments to the Acts. We learned that EPA has not proposed tribal amendments to the Acts as yet, even though the Agency has drafted language that would authorize EPA to treat tribes as states for purposes of both laws. EPA's Indian policy specifically states that the Agency will seek amendments to federal environmental statutes to allow tribes to participate fully in the enforcement of those laws. The fact that the Agency has not proposed amendments to that effect is only one more example of its failure to keep promises made to Indian tribes.

I believe it would be extremely helpful to our efforts for your Committee to inquire at EPA as to the status of its efforts to prepare tribal amendments to RCRA and the Clean Air Act for the consideration of the Congress. With both laws currently before Congress for re-authorization, there is a clear opportunity to remove the existing statutory obstacles to full tribal participation. As you know, the Clean Water Act and the Safe Drinking Water Act both were amended two years ago to allow full tribal participation in the enforcement programs governing water quality. It would assist us greatly if the Agency would fulfill its commitment and work with us in asking Congress to admit tribes to the family of governments working for the protection of the nation's natural resources.

Finally, I respectfully request that you ask your colleagues on the Committee on Environment and Public Works to work with interested tribal governments to develop amendments allowing for full tribal participation under the two statutes. With your help and that of other supporters of tribal self-government, we can have a federal environmental regulatory system that assures tribal governments their rightful role in environmental decisions affecting their reservations.

Your every consideration of these requests is deeply appreciated. I would be pleased to provide further information as needed, or to assist you and your staff in any way.

Sincerely,

Wesley Martel

Wesley Martel, Chairman

Testimony of Kevin Gover of Gover, Stetson, Williams & West, P.C.
Before the Special Investigative Committee of the
Senate Select Committee on Indian Affairs

At the request of the Special Investigative Committee, I am providing this testimony regarding a critical situation that has arisen on the Wind River Reservation of the Shoshone and Northern Arapahoe Tribes (the "Tribes"). Specifically, the Tribes continue to be deeply concerned about the damage being done to a highly valuable historic Tribal fishery by the Bureau of Reclamation's ("BREC's") management of the Bull Lake Reservoir on the Reservation.

Since development of the reservoir BREC consistently has managed the project in a manner that gives paramount priority to supplying irrigation water to non-Indian users. During drought conditions, which the region has experienced for the past several seasons, this approach has meant the virtual destruction of the Tribe's fishery both in the Reservoir itself and in Bull Lake Creek below. The fishery is important to the Tribes for subsistence, for religious purposes, and for the sports fishery activities on which the Tribes rely financially. The central question is whether, in years of water shortage, the Reservoir should be managed to protect the Tribal fishery as well as to provide water to non-Indian users.

The position taken by BREC turns on its interpretation of the authorizing legislation for the Bull Lake Reservoir project. BREC states that it has read such legislation in light of settled principles of Indian law concerning statutory construction and the fiduciary responsibilities of the United States with respect to Indian tribes. The project was authorized pursuant to the Act of March 14, 1940, 54 Stat. 49, 43 U.S.C.A. § 597(a) (the "1940 Act"), which created the grant of an easement for the dam site and a flowage easement:

> . . . together with all rights and privileges incident to the use and enjoyment of said easements, over tribal and allotted lands within that part of said reservation required for the construction of the Bull Lake Dam and Reservoir on Bull Lake Creek . . . in connection with the Riverton reclamation project, Wyoming, and for the impounding of approximately one hundred and fifty-five thousand acre-feet of water, including a ten-foot freeboard . . . .
>
> Section 3. The easements herein granted shall not interfere with the use by the Indians of the Wind River or Shoshone Indian Reservation of the lands herein dealt with and the waters of Bull Lake Creek and the reservoir insofar as the use by the Indians shall not be inconsistent with the use of said lands for reservoir purposes.

54 Stat. 49. The legislative history of the 1940 Act is scant and provides no clear indication of congressional intent regarding the relative priority of the water rights of the Tribes and non-Indian irrigators.

On October 28, 1988, the Field Solicitor for the Pacific Northwest Region rendered an opinion to the Billings Regional Director of BREC that purported to address the question "as to the rights of the Tribes to the use of natural flows or water stored in Bull Lake Reservoir to satisfy an instream flow right." Memorandum of October 28, 1988, from Richard K. Aldrich, Field Solicitor to Regional Director, Bureau of Reclamation, Billings (the "BREC Opinion"). Although the Regional Solicitor's precise reasoning and conclusion often are difficult to decipher, BREC appears to conclude that the statute prohibits it from managing the Reservoir in such a way as to protect the tribal fishery while supplying water to non-Indian farmers. The principal points he raises in reasoning to this conclusion are the following:

1. The BREC Opinion concedes that "[c]anons of construction regarding congressional actions affecting Indian rights provide that the federal action should be interpreted as protective of Indian rights and in a manner favorable to the Indian interest." BREC Opinion, at 2-3.

2. The BREC Opinion also appears to recognize the Tribes' rights to water in connection with the Bull Lake fishery, but subordinates this right to the United States' use of Bull Lake Creek for reservoir purposes:

> . . . it is clear that in the 1940 Act Congress had no intention of extinguishing the tribes' interest in water rights or the fish resources in the original Bull Lake and Bull Lake Creek. However, it is equally clear that the 1940 Act subordinated the retained use of the lands, the waters of Bull Lake Creek and the Reservoir by the Tribes to the use by the United States for reservoir (project) purposes.

BREC Opinion, at 3.

3. Furthermore, the BREC Opinion states that "[r]ecognizing the Tribe's right both to control and engage in the taking of fish and game is not, however, dispositive of the question of the right to control reservoir levels and minimum stream flows." BREC Opinion, at 4.

4. The BREC Opinion concludes that the Tribes' favorable decision in the Big Horn water quantification litigation did not reserve to the Tribes a "water right for instream flows in Bull Lake Creek or for maintenance of pool elevations in Bull Lake Reservoir." BREC Opinion, at 6.

5. In its Summary and Conclusion, the BREC Opinion concludes that the "Secretary must fulfill his fiduciary responsibility to the Tribes and his contract obligations to the water users so that the project facilities are operated as effectively as practicable." BREC Opinion, at 8.

The difficulties with BREC's Opinion are numerous and substantial. Most fundamentally, the Opinion does not answer the principal question being asked--namely, whether, in times of water shortage, the Tribes or

non-Indian irrigators have first call upon the water in Bull Lake and Bull Lake Creek. It is not helpful and, indeed, is circular merely to say that the Secretary of the Interior is obligated, in managing Bull Lake, to honor his fiduciary duty to the Tribes and, at the same time, his contract arrangements with non-Indian water users. The real question is precisely what happens when these respective obligations come into conflict. The BREC Opinion does not attempt at all to give specific content to the fiduciary duties of the United States in these circumstances.

This kind of ambiguity and circularity is characteristic of the BREC Opinion in other respects. The Opinion acknowledges the Tribes' right to water, to fish in Bull Lake Creek and Bull Lake, to regulate the fishery, and, apparently, to dedicate a portion of their water rights for fish habitat maintenance. BREC also concedes that, in analyzing the impact of the easement provision, liberal rules of statutory construction must be employed. The BREC Opinion, however, never addresses directly what specific actions these principles and conclusions dictate as between the Tribes and non-Indian water users with respect to Bull Lake and Bull Lake Creek in years of water shortage.

Where the BREC Opinion does intimate certain legal conclusions, the Tribes often find them objectionable and inconsistent with settled principles of Indian law. From the Tribes' standpoint, for example, BREC's analysis of the 1940 Act hardly applies in fact the lip service paid to the principle of liberal statutory construction where Indian legislation is involved. The only respect in which the 1940 Act, on its face, "subordinates" the interests of the Tribes is where their uses of project lands or the waters of Bull Lake Creek are "inconsistent with the use of said lands for reservoir purposes." This "subordination" can be interpreted to mean nothing more than the Tribes' inability to use the project lands for any purpose other than reservoir purposes. The use of Bull Lake or Bull Lake Creek water to protect the fish habitat arguably is not inconsistent with such a subordination.

This conclusion is especially compelling in light of the United States' probable fiduciary responsibilities with respect to the Tribal fishery. Indeed, the status of the fishery was the subject of a Solicitor's opinion almost a half century ago, and there the conclusion was as follows:

> [The 1940 Act] . . . only granted easements to the United States over tribal and allotted lands of the Wind River Reservation for a dam site and reservoir purposes in connection with the development of the Riverton Reclamation project. Not only did this act not extinguish Indian title, but section 3 thereof expressly provided: 'The easements herein granted shall not interfere with the use by the Indians of the Wind River or Shoshone Indian Reservation of the lands herein dealt with and the waters of Bull Lake Creek and the reservoir insofar as the use by the Indians shall not be inconsistent with the use of

> said lands for reservoir purposes.' This express reservation of existing rights confirms the conclusion that Indian control of the lake for fishing purposes was not affected in any way. I am not informed, and I have no reason to suppose that fishing activities will be 'inconsistent with the use of said lands for reservoir purposes.' At most only the lower end of the lake has been modified by the reclamation project.

58 I.D. 331, 334 (February 12, 1943). Thus, the special relationship between the Tribe and the United States with respect to the Bull Lake fishery remains intact, and should mandate the Tribes' first call on Bull Lake and Bull Lake Creek water during times of drought.

The BREC Opinion's analysis of the Tribes' dedication of a portion of their adjudicated water rights under the Big Horn case for the maintenance of fish habitats also is legally faulty. The Opinion concedes that the Tribes are entitled to use part of their adjudicated water right to protect fish habitats, but then implies that water in Bull Lake Creek itself cannot be employed for these purposes. On its face this train of reasoning is self-contradicting.

In conclusion, the BREC Opinion, which at the present time is the principal piece of legal guidance provided by the federal government, is objectionable from the Tribes' standpoint in several respects. First, it fails ultimately to resolve the central question--namely, whether, in times of water shortage, the Tribes or non-Indian irrigators have priority in using the water in Bull Lake and Bull Lake Creek. Second, to the extent that it does intimate views or conclusions on issues relating to this question, they often are not consistent with settled principles of Indian law.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
999 18th STREET - SUITE 500
DENVER, COLORADO 80202-2405

MAY 12 1989

Ref: 8WM

Michael Anderson, Associate Counsel
Special Committee on Investigations
U.S. Senate Select Committee on Indian Affairs
901 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Anderson:

This is written to respond to your request of May 4, 1989, regarding our visit to the Wind River Reservation and to provide information on the Environmental Protection Agency's (EPA) water quality activities on the Reservation.

On April 5-6, 1989, Vern Helbig, EPA, Denver accompanied Fish and Wildlife Service personnel and yourself on a field reconnaissance of the Wind River Indian Reservation, Wyoming. The primary purpose of the trip was to observe the extent of Clean Water Act (CWA) Section 404 violations and other surface water problems on the Wind River Reservation.

It was apparent that there have been many violations of Section 404 of the Clean Water Act on the Reservation. Some of these are being consensually resolved; however, many violations are being ignored. There are also some 404(f) exemption violations that have occurred in the past. Some of these are apparently annual projects and need to be brought into compliance with the law. Other water quality problems, including turbidity, due to sluicing operations, frequently occur at the Bureau of Reclamation diversion dam on the Wind River. Related water problems on the reservation include maintenance of a minimum pool and flows associated with Bull Lake minimum flows downstream of diversion dams, the loss of fish in irrigation canals, and discharges violating a National Pollutant Discharge Elimination System permit.

We have had some contact with Reservation residents in the past but anticipate considerably more as sources of funding to address water quality problems become available to Tribes under the CWA and Safe Drinking Water Act (SDWA). In the mid-to-late 1970's, Wind River received a Clean Water Act grant under Section 208 to begin to assess and manage water quality activities on the Reservation. I understand the Tribes will be receiving a wastewater treatment grant and have also applied for a Clean Water Act Section 106 grant. It is anticipated that the Joint Business Council, the governing body of the Shoshone and Arapahoe Tribes, will seek other grants under both the Clean Water Act and the Safe Drinking Water Act.

It is our hope that, with the receipt of these potential sources of funds, we could go a long way toward the development of baseline data and stream water quality standards leading to the development of water codes which could prioritize and resolve the many water quality/quantity issues which must be addressed.

We look forward to working with you on this most important issue.

Sincerely,

for Max H. Dodson
Director
Water Management Division

NATIVE AMERICAN FISH & WILDLIFE SOCIETY
750 Burbank Street • Broomfield, Colorado 80020
Phone: (303) 466-1725 • FAX: (303) 466-5414

FY90 TESTIMONY
before the
SENATE SELECT COMMITTEE ON INDIAN AFFAIRS -
SPECIAL COMMITTEE ON INVESTIGATIONS

Honorable Members of the Senate Special Committee on Investigations:

I'm Dewey Schwalenberg, Executive Director of the Native American Fish & Wildlife Society

The Native American Fish & Wildlife Society appreciates the opportunity to testify before you on behalf of Tribal Self-Determination in Fish and Wildlife Management. Our testimony regarding water resource mismanagement on the Wind River Reservation unfortunately represents the "state-of-the-art" that federal agency interaction has attained. Such management practices fail to meet both the Federal Trust Responsibility to Tribal Governments as well as the stewardship trust responsibility to the resources themselves.

My background in resource management encompasses a wide range of resources and the agencies that manage them. I have received a Bachelor of Science degree in Wildlife Management, Biology, and Secondary Education in (Biology and Life Sciences) from the University of Wisconsin - Stevens Point. My work experience includes: experience in the public sector as a technician for the Wisconsin Department of Natural Resources; experience in the private sector as a manager, biologist and game keeper for the Smoky Lake Reserve hunting and fishing club, experience in the forest products industry as an independent logger, experience in the northern Wisconsin recreation industry as a scuba diving and underwater salvage retail business operator and hunting and fishing guide; and experience in the Tribal Government/Federal sector, in management of Tribal fish, wildlife and natural resources for the Lac du Flambeau Band of Lake Superior Chippewa Indians, and currently with the Native American Fish & Wildlife Society as its Executive Director and Associate Member. Tribal resource conservation program development has caused my direct involvement with Federal Agencies such as the Bureau of Indian Affairs (BIA), U.S. Fish & Wildlife Service, U.S. Department of Education, Administration for Native Americans, Department of Housing and Urban Development, National Marine Fisheries Service, U.S. Department of Agriculture, etc. My educational work experience includes teaching at the junior high and high school levels and at the college and

vocational technical training level in conjunction with the Nicolet College and Technical Institute and the Lac du Flambeau Tribal Fisheries Vocational/Technical Training Program.

The Native American Fish & Wildlife Society is a "Public Charitable" non-profit IRS 501(c)(3) organization that was developed by Indian people in 1982 after realizing the need for an organization to operate at the national level to translate Tribal concerns into Federal Government action. More importantly, the originators of the Society were convinced that the U.S. Department of Interior had failed to incorporate Tribal fish and wildlife management needs into any meaningful, long term comprehensive plan that supported Tribal Government self-determination. The original founders were also convinced that current federal policy failed to incorporate cultural and religious aspects of management principles into federal management activities, failed to meet the federal trust responsibility to Tribal Governments as individual sovereign nations, and grossly mismanaged the resources held in trust for the Tribes. This sense of frustration led the Society to assume a charitable/educational scope of work in an effort to teach Tribal Governments and its members what the basic fundamental needs of Tribal resource management are while demonstrating the need for development of creative management practices that are based upon Tribal needs for future generations. One of the way in which the Society accomplishes these goals is through annual regional conferences held throughout the nation, and through a national conference held in a different region each year. Existing Tribal fish and wildlife programs are show-cased in the conferences and technical training sessions define Tribal management practices and principles. Program success is judged by the ability to meet professional management standards while retaining the traditional and cultural values of the Indian people they serve. Further evaluation, inescapably, centers upon the ability of the program to secure and maintain funds to perpetuate the management activity. A complete network of communication between Tribal managers has developed to further increase the local Tribal management capability. Federal and state resource managers are encouraged to participate in the annual forum and present their programs and views about how Tribal resource management works. All too often, the federal representatives are unable to interpret federal policy and define long term federal goals relative to Tribal management needs, or to present up-to-date factual data to support contentions that Tribal resources are, in fact, getting the attention that the Federal trust responsibility requires.

Gradually, over the past seven years, the Society has grown to a current membership of 350 individuals, 6 affiliate organizations, and 37 Tribes. Communications have intensified through the development of a National Communications Task Force centered in the Society's National Office in Broomfield (Denver), Colorado. In 1987, a national headquarters staff was employed to maintain the Society's business responsibilities and a comprehensive planning process was begun under the direction of the eleven member Board of Directors. This planning effort represents a "grass-roots" level management initiative, directed exclusively by Indian professional resource managers with support of professional non-Indian members of the Society on an advisory basis. The Native American Fish & Wildlife Society, we feel, represents the most astute example of Indian Self-Determination in the country today in national fish and wildlife management. Future intent of the Society is to develop a National Tribal Resource Database, continue to serve Tribal Governments, and interact with federal, state and private fish and wildlife management entities. The Society's latest professional accomplishment has been receipt of the prestigious U.S. Fish & Wildlife Service's Director's Award for production of the video "Our Native American Wildlife Heritage" in the Take Pride in America program.

In response to the Senate Special Committee on Investigations' request, I personally toured the Wind River Reservation to assess the potential impact upon the water resources of the Bureau of Reclamation and BIA water control structures and management practices, and their relationship to the Tribal fisheries resources. Four primary areas were highlighted in the tour by Mr. Richard Baldes of the U.S. Fish & Wildlife Service on May 1st-3rd, 1989. My analysis for each of the areas follows:

1. Bull Lake Reservoir

The Bull Lake Reservoir appeared to offer extensive multi-dimensional resource use potential. Irrigation, fisheries, recreation, flood control, and aesthetics are all key aspects of the lake's potential. My experience at the lake indicated that extremely low water levels (less than 30,746 acre feet) existed and fish spawning habitat was completely exposed, thus rendering the lake incapable of self-perpetuating the Lake Trout and Ling Cod populations historically contained therein. An analysis of the data that Mr. Baldes presented indicated that previous management practiced by the Bureau of Reclamation had

maintained substantially greater water reserves in Bull Lake throughout the winter, which had contributed to the continuation of the trophy fishery that had dramatically declined since the water management practices had changed. The most obvious mismanagement factor surrounding this situation was the lack of a multi-use cooperative management concept and plan that has become the standard of the professional industry as evidenced by many of the management situations in the Pacific Northwest and the Great Lakes. The single use management concepts, as described at Bull Lake, are destructive to the fisheries resource and the recreational resource management opportunities for Tribal and non-Indian users. In addition, the design of the dam, spillway and water control structure provided no possible means of fish passage to allow for normal movement of fish from the river below, through the reservoir, and into the tributary streams of the watershed above where historical spawning activities most assuredly occurred.

2. Bull Lake Creek

Upon examination of the Bull Lake Creek between the reservoir and the Wind River, a number of problems were encountered. The first existed below the reservoir spillway and was in the form of fine materials that had been introduced into the stream by the Bureau of Reclamation as a temporary dam to facilitate repair work on the spillway structure. This activity constituted a violation of the Federal Clean Water Act because no federal "404" permit had been issued. It also consitituted a violation of the Wildlife Coordination Act and other federal statutes; but even worse, this activity constituted a violation of good judgement, in my opinion, based upon the fact that trout reproduction areas were immediately downstream of the temporary dam and fine sediments worked into these nursery areas smothering the eggs and young trout. Although the temporary dam had been removed prior to my visit, the remains of the fine material introduced artificially into the stream could be observed. Another example of the lack of coordinated management was demonstrated by Mr. Baldes in his data indicating a lack of minimum in-stream flows under the Bureau of Reclamation practices in the Bull Lake Creek. My personal observation indicated that drastic water level changes occurred on a day-by-day basis in the traditional trout spawning areas that were pointed out. These water level changes most assuredly affected fish production and minimum flows would have to be maintained at critical periods to sustain a desired fish population level. Mr. Baldes' information documented significant low water adult fish mortalities

due to temperature increases that occurred as the pools warmed after their separation from the main river flow.

3. Wind River Diversion Dam

Perhaps the most mismanaged and detrimental Bureau of Reclamation structure visited was the Diversion Dam on the Wind River that relocated water to the Riverton Reclamation Project. This structure had a negative impact on nearly 40 miles of the Wind River because the current operation of the dam diverted a substantial part of the water from the Wind River, as our observations confirmed. The design of the project provided an additional hazard to the resource downstream in that the river channel above the dam had been artificially altered and was now redepositing silt from past flood plains back into the river. This siltation caused the Bureau of Reclamation great problems in maintaining their flows of irrigation waters through their canals, and it was obvious that extensive activity was maintained to mechanically remove the silt from the canal system. Downstream of the dam it was equally obvious that major silt loads had been introduced into the river in an effort to periodically purge the silt behind the dam. This silt was noticeable throughout the stream's course and undoubtedly created problems for fish and aquatic life throughout the reaches of the 40 miles of stream under investigation. The reduced in-stream flows associated with the diversion of the water also severely limit fish populations and reproduction activities and the commensurate recreational opportunity that would exist if proper management would be performed. The design of the dam structure itself had originally anticipated movement of fish to the upper river areas, as there was a fish passage structure built into the edge of the dam. This structure, however, was not operational and appeared to have been out of use for a long period of time judging from the build-up of debris and materials in the structure. By far the most damaging aspect of the diversion dam management plan appeared to be the dewatering of the Wind River at critical periods of the year. Current deficiencies could be negated if the "management WILL" would be present to cooperatively manage for multiple use benefits. Increased in-stream flows on a continuing basis — with major flows at peak flood periods — could reduce the siltation load of the stream through a natural scouring action over a long period of time.

4. BIA Diversion Dams

Scattered throughout the area were smaller dams and water diversion structures that were operated and maintained by the BIA. These structures were maintained to provide diverted waters into irrigation canals for agricultural irrigation purposes. The most noticeable negative management practice was the extent of the diversion of water out of the main stream. In many places, stream flows were merely a trickle in the river channel. Such flows obviously could not support the reproductive activities of the trout in the streams and relegated fish to small pool areas in the canals. Such an existence is precarious at best as fish are crowded into small areas which makes them vulnerable to predation, and the rapid water changes by system operators significantly reduces fish habitat and production.

The conspicuous lack of historical data by the BIA on the actual water requirements of irrigation users and the actual water supplied to users makes potential management changes nearly impossible to determine. Although at one location new BIA in-stream flow measurement equipment was noted, the historical lack of such equipment and the data that should have been accumulated represents the lack of concern by the BIA for potential multiple-use management, and this fact, in our reasoning, represents resource mismanagement.

Structures along these diversion canals have limited movement of fish and aquatic organisms, as no permanent fish passage structures were evident.

Conclusion Statement

Insertion of a National Perspective to the previous comments must begin by identifying the outdated and antiquated mindset and methodology that federal agencies employ in Tribal resource management. Single-use management concepts, as previously described, coupled with a lack of real understanding of what other program requirements are, lead to turf battles and political posturing that bureaucracy is famous for. Lack of a meaningful mitigation process to technically resolve management impasses allows problems to continue for years.

Our questions in these situations are — What does the Tribal Government require in the use of this resource? Where is the direct Tribal involvement in the decision making process? Where do the locally determined activities and objectives come from? and Where is the long-range cooperative planning

process? A Federal policy of "DOING FOR" the Tribal Governments can mean direct conflict between traditional, cultural and other Tribal priority uses of the resources and agency policies. We have found that where Tribes employ professional managers directly within the Tribal management system, and where these managers are accountable directly to Tribal decision makers, Tribal interests are ultimately being served. We also find that where Tribes exercise their self-determination initiative by working cooperatively with state, federal, and private organizations, directing these organizations in Tribal management initiatives while accepting the professional assistance being offered, Tribes have made great strides in management of their resources. It is when Tribal Governments are excluded from directing the development of resource management that we find resistance and resentment to federally demonstrated policies which fail to support Tribal needs.

Historically, practical resource management has developed based upon funding mechanisms that provided incentives to the STATE governments for engaging in management activities. In effect, matching federal programs (e.g., Dingell-Johnson, Pittman-Robertson, Wallop-Breaux) allowed politicians to successfully prioritize resource management against other state concerns. Tribal Governments lack such economic incentives in that they are in direct competition with Federal agencies who are charged with management of Tribal resources. Many Tribes in the Great Plains and Southwest Regions, as an example, are grossly underfunded with federal dollars for the resource management responsibilities that they assume. Some Tribal Governments have had to assume one hundred percent of resource management expenses, while state governments are receiving seventy-five percent federal subsidies for similar fisheries and wildlife enhancement programs. As federal agencies struggle internally to retain funds to assist the Tribes, Tribal Governments fail to realize their own management initiatives. Direct funding of Tribal management initiatives means a commensurate halt to agency development, a price that most federal agencies are not willing to pay.

Additionally, off-reservation treaty co-management responsibilities are ever increasing Tribal management activities, using Tribal management funds, but restricting the funding available to on-reservation management requirements. In fact, federal agencies cannot maintain adequate budgets to meet Tribal management assistance requirements, much less pass down funds directly to Tribal Governments to meet P.L. 93-638 Self-Determination management objectives.

One key element of the federal policy that has probably created more ineffectiveness in Tribal resource management than any other single factor is the federal government's TRUST responsibility to Tribal Governments. We feel it is time for meaningful government-to-government discourse on what the federal government's TRUST responsibility IS as perceived by the Tribal Governments in respect to Fisheries and Wildlife Resource Management. Such discourse would invariably lead to Tribal decisions on what management priorities exist, what system of management should be employed, what funding mechanism would best suit long term management requirements, and how residual management benefits would be available to other user groups. We feel that TRUST RESPONSIBILITY answers must originate from the TRIBAL management grass roots level, be processed by Tribal Governments, and presented to Congress for appropriate action. We feel that Congress must demonstrate an interest in Tribal definition of "TRUST RESPONSIBILITIES" and in a long-range planning process to reach these Tribal goals and objectives through funding of grass roots Tribal management programs. Congressional dependency on the Department of Interior to "do what's right for the Indian people" fails miserably in meeting the trust obligation that the Federal Government has assumed. Such a policy also keeps Tribal Governments from meeting their obligations to their Tribal constituents and in turn reduces the respect of Tribal Members for their government's management capabilities and decision-making ability.

Practical management answers exist throughout Indian country in the Indian people, their communities, and their chosen professional management advisors and organizations. Congress only needs to support the recommendations that Indian Country is making by providing directives to the Department of Interior to incorporate the NEW Tribal thinking and management capabilities into a long-range Interior planning process. Direction by Congress for a cooperative planning process among federal agencies working within the Tribal land base, assuring direct Tribal involvement in such a process, would go a long way in proving to Tribal Governments that federal Self-Determination principles are being supported. And finally, accept the suggestions of the new breed of Tribal resource managers who have come up the "HARD" way through Tribal management systems to trust the Tribes with their own future. Professional requirements associated with the funding process and the personal professional ethics of Tribal managers will more than control the actions of the few unscrupulous individuals who may inhabit the system. Tribes CAN manage their resources, given half a chance.

United States Department of the Interior
OFFICE OF THE SOLICITOR
P.O. BOX 31394
BILLINGS, MONTANA 59107-1394

October 28, 1988

LBR.BL.0463

MEMORANDUM

TO: Regional Director, Bureau of Reclamation, Billings

FROM: Richard K. Aldrich, Field Solicitor
Pacific Northwest Region (Billings)

SUBJECT: Request of Shoshone and Arapahoe Tribes of the Wind River Reservation Regarding Minimum Stream Flows in Bull Lake Creek

In your September 19, 1988, memorandum you requested our opinion on what, if any, water rights the Shoshone and Arapahoe Tribes of the Wind River Reservation have to require minimum stream flows in Bull Lake Creek. You have specifically requested our opinion as to the rights of the Tribes to the use of natural flows or water stored in Bull Lake Reservoir to satisfy an instream flow right. Your request is the result of and in response to inquiries from the Tribes.

Background. In our November 9, 1982 opinion, based upon an interpretation of the Act of March 14, 1940 (54 Stat. 49, 43 U.S.C. §§57a-57d) (hereafter "1940 act"), we advised that, "There is no reservation [to the Tribes] of a right to control stream flows or reservoir surface elevations" in Bull Lake Creek and Bull Lake Reservoir. We further advised that, "The obligations of the Bureau of Reclamation [and the Tribes] are dependent upon the outcome of the ongoing [Big Horn] adjudication and the development of Indian water uses. Until that time, the Bureau's obligation would appear to be satisfied by the current operation. That is, minimum winter releases equal to winter inflows, storage during runoff occurrences, and release [of stored water] for downstream irrigation demand during the irrigation season."

The following analysis and conclusions replace those in our 1982 opinion. Before proceeding to a discussion of the Indian water rights issues associated with the authorization for the construction and operation of Bull Lake Reservoir, we will review the effect of the legislation authorizing the construction and operation of Bull Lake Dam on the interests of the Shoshone and Arapahoe Tribes in Bull Lake Reservoir and Bull Lake Creek.

Bull Lake Dam and Reservoir Bull Lake Dam and Reservoir were authorized and constructed for Riverton Project purposes. 43 U.S.C. 579a. The 1940 act authorized the grant of an easement for the dam site and a flowage easement:

> ". . . together with all rights and privileges incident to the use and enjoyment of said easements, over tribal and allotted lands within that part of said reservation required for the construction of the Bull Lake Dam and Reservoir on Bull Lake Creek . . . in connection with the Riverton reclamation project, Wyoming, and for the impounding of approximately one hundred and fifty-five thousand acre-feet of water, including a ten-foot freeboard . . .
>
> Sec. 3. The easements herein granted shall not interfere with the use by the Indians of the Wind River or Shoshone Indian Reservation of the lands herein dealt with and the waters of Bull Lake Creek and the reservoir insofar as the use by the Indians shall not be inconsistent with the use of said lands for reservoir purposes.

43 U.S.C. 597a and 597c.

The legislative history of the 1940 act is sparse. Two virtually identical reports were published by the Senate and House Committees on Indian Affairs.1/ Both recommended that the bill as introduced be passed without amendment. Both used the Department's identical letters to the respective committees about the bill to explain its purpose. According to the Department's letters in the reports, only interests in reservation land were intended to be acquired. Compensation was to be paid for the "fair and reasonable value of the lands affected and of the damages to be accrued by virtue of the construction of Bull Lake Dam and Reservoir . . . ." Id. The land values were to be determined pursuant to an appraisal method arrived at by the Bureau of Reclamation and the Office of Indian Affairs with the concurrence of tribal representatives.

The appraisal instructions were the subject of a Solicitor's opinion for the Secretary. M. 29200, July 31, 1937. The opinion responded to questions about how the value of land, permanent improvements to the land and personal property should be determined. There is no indication that any tribal water rights were to be appraised or taken in the process of constructing Bull Lake Reservoir.2/ Canons of construction regarding congressional

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1/ Senate Report No. 1036, 76th Cong. 1st Sess. (July 28, 1939) and House Report No. 1617, 76th Cong. 3d Sess. (February 19, 1940).

2/ The opinion reported that the Indian Service had not considered the development of the dam site for Indian uses on the

actions affecting Indian rights provide that the federal action should be interpreted as protective of Indian rights and in a manner favorable to the Indian interest. United States v. Shoshone Tribe, 304 U.S. 116-118 (1938); see also F. Cohen, Handbook of Federal Indian Law (1982 ed.) 221 et.seq. From this record it is clear that in the 1940 act Congress had no intention of extinguishing the tribes' interest in water rights or the fish resources in the original Bull Lake and Bull Lake Creek. However, it is equally clear that the 1940 Act subordinated the retained use of the lands, the waters of Bull Lake Creek and the Reservoir by the Tribes to the use by the United States for reservoir (project) purposes.

Tribal "fishing" interests in Bull Lake and Bull Lake Creek. The tribes' interest in the fish resources of Bull Lake and Bull Lake Creek were addressed earlier in the Assistant Secretary's opinion "Regulation of Hunting and Fishing on Wind River Reservation in Wyoming," 58 I.D. 331 (February 12, 1943) (hereafter "1943 opinion"). In the 1943 opinion, the Secretary considered the hunting and fishing interests of the Indians in two reservation reservoirs, Bull Lake and Ray Lake.

The Secretary first addressed the "simpler questions, which are whether the tribal councils have authority to regulate hunting and fishing on the diminished portion[3/] of the reservation." Id. at 332. The Secretary concluded that the tribes had authority to regulate hunting and fishing by both Indians and non-Indians on the Bull Lake and Ray Lake. Id. at 348. The Secretary went on to consider whether there were any "special circumstances affecting the rights of the tribal councils to regulate fishing in the waters of Bull and Ray Lakes." Id. at 334. With regard to Bull Lake, the Secretary concluded that the 1940 act:

> only granted easements to the United States over tribal and allotted lands of the Wind River Reservation for a dam site and reservoir purposes in connection with the development of the Riverton Reclamation project. Not only did this act not extinguish Indian title, but section 3 thereof expressly provided: "The easements

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Wind River Indian irrigation project. Id. at 4. The opinion also stated that the tribes have no control over water rights already allocated by the United States to designated lands in the Indian project. Id. at 6. The remark may have been intended to anticipate a claim by the tribes that the site would be useful for water supply development for Indian project lands.

3/ The "diminished portion" of the reservation refers to that part of the reservation which was never opened to non-Indian settlement under the public land laws pursuant to a cession agreement between the United States and the tribes. Act of March 3, 1905, 33 Stat. 1016. Bull Lake and Ray Lake both are within this portion of the Wind River Reservation.

-3-

> herein granted shall not interfere with the use by the Indians of the Wind River or Shoshone Indian Reservation of the lands herein dealt with and the waters of Bull Lake Creek and the reservoir insofar as the use by the Indians shall not be inconsistent with the use of said lands for reservoir purposes." This express reservation of existing rights confirms the conclusion that Indian control of the lake for fishing purposes was not affected in any way. I am not informed, and I have no reason to suppose that fishing activities will be "inconsistent with the use of said lands for reservoir purposes." At most only the lower end of the lake has been modified by the reclamation project.

Id. at 114. Consequently, the Tribes have the right to fish and hunt in Bull Lake Creek and Bull Lake Reservoir. The Tribes also have the authority to regulate hunting and fishing on Bull Lake Creek and Bull Lake Reservoir. Recognizing the Tribe's right both to control and engage in the taking of fish and game is not, however, dispositive of the question of the right to control reservoir levels and minimum stream flows.

Against this backdrop, two issues remain to be considered:

--The effect of the decision in the Big Horn River adjudication[4/] on the right of the tribes to use water for maintenance of instream flows on Bull Lake Creek;
--The extent of the Secretary's responsibility to manage the operation of Bull Lake Reservoir and the outlet works at Bull Lake Dam in view of the Shoshone and Arapahoe Tribes' interest in the fish resources.

Big Horn River adjudication. In the adjudication of the reserved water rights of the Wind River Reservation, the Wyoming Supreme Court ruled that the quantification of the reserved water right for the Wind River Reservation was properly measured by the district court in terms of the water requirements of the practicably irrigable acreage on the reservation.

4/ In re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, Civil No. 4993 (Fifth Judicial District, Wyoming, May 11, 1983) (hereafter "district court opinion"); Order ruling on motions to alter or amend the decision of May 10, 1983, No. 101-234 (Wyoming Dist. Ct. 1st Jud. Dist., June 8, 1984) (hereafter "1984 order"); Amended Judgment and Decree, No. 101-234 (Wyoming Dist. Ct. 1st Jud. Dist., May 24, 1985 (hereafter "1985 decree"); No. 85-203 (Wyoming Supreme Court, February 24, 1988) (hereafter "Supreme Court opinion").

> The measure of the Tribes' reserved water right is the water necessary to irrigate the practicably irrigable acreage on the reservation . . .The district court was correct in quantifying the Tribes' reserved water right by the amount of water necessary to irrigate all of the reservation's practicably irrigable acreage.

Supreme Court opinion 30.

While the Wyoming Supreme Court ruled that practicably irrigable acreage was the measure of the reserved water rights for the Wind River Reservation, it concluded that municipal, domestic, commercial and stockwatering uses were subsumed in the measure of the reserved right. Id. at 27. The court also concluded that fisheries, mineral and industrial development, and wildlife and aesthetics maintenance were not separate purposes for which a reserved water right could be quantified in the circumstances of this case. Id. at 26-27. Thus the Court held that there was no separate water right for these purposes, but in doing so, the court left intact the ruling of the district court that the irrigation measure did not limit the use of the reserved right.

> The Tribes are entitled to make such use of the water covered by their reserved water rights they deem advisable but the use is confined to the reservation and in no event shall the consumptive use be increased.

District Court Opinion, Judgment and Decree 70; 1985 decree 17.

> As in all the water granted in this case [for the benefit of the tribes], . . . the tribes are not limited in the character of use of the water.

1984 order 14.

The district court ruled:

> The reserved water right quantified by Judge Joffe does not deny the Tribes the ability to regulate instream flows in order to maintain what may be considered necessary water for optimum fish habitat, nor does the opinion limit any such power that may exist on the part of the Tribes. The Tribes may seek to dedicate their stream flows for fish habitat by using water reserved to them by the decision.

1984 order 10-11.

The natural flow water reserved to the tribes for irrigation purposes may be dedicated for instream flows in such quantities and at such times as were set under the decree.5/ The use will be further constrained by the provisions of the 1940 act as well as the other terms of the tribes' adjudicated reserved water rights. In particular, the consumptive use shall not be increased. For example, the Court identified limited irrigable lands and reserved water rights in the Bull Lake Creek watershed.6/ Thus, in the Big Horn River adjudication, the Tribes received no reserved water right for instream flows in Bull Lake Creek or for maintenance of pool elevations in Bull Lake Reservoir. In addition, the Tribes received no right to call upon water stored in Bull Lake Reservoir.

Secretary's responsibility in management of reclamation and Indian affairs program The management issues associated with the operation of Bull Lake Reservoir emerge from the objectives of the Indian Affairs program for the Wind River Reservation as affected by the Reclamation program pursuant to the 1940 act. While the Tribes have no right to call upon Bull Lake storage, nor the right to require instream flows or water surface elevations in Bull lake Reservoir, there are opportunities resulting from various project operational alternatives which would allow the release of stored waters or holding of water in storage in a manner which may satisfy some of the Tribes fisheries concerns. The decision to do so is dependent upon water supply, project water rights pursuant to contract with the USA and upon the timing of and the ability to satisfy the Tribal requests.

From the foregoing discussion it is clear from both the 1940 act and the Department's analysis of it in the context of the Indian program, that implementation of the 1940 act was to be carried out while allowing the continued use of the reservation's resources in Bull Lake Creek. However, the continued use cannot be inconsistent with the use of the easement land for reservoir

5/ See footnote #8.

6/ The decree awarded 296 acre feet annually for the irrigation of lands in the Bull Lake Creek watershed. On an annual basis, although the entire 296 acre feet is not "consumptively used", 296 acre feet equals less than one cubic foot per second (cfs), approximately 4/10 of one cfs. For the irrigation season, April 15 through October 15 of each year, approximately six months, 299 acre feet is only 8/10 of a cfs. A review of the water supply analysis prepared by the government's expert in the adjudication and further analysis by the Bureau of Reclamation of the system operations for the Riverton Project should provice additional information on the amount of water physically available from Bull Lake Creek for irrigation and instream flow both in the Bull Lake Creek watershed and on the mainstream of the Wind River.

purposes. The Department's fiduciary responsibility in this case is to insure that all water is delivered pursuant to the court decree and the contract1/ with the Midvale Irrigation District and the district water users; any other water remains available for use by the tribes or other water users in priority. See Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D. D.C. 1973). In that case, similar facts to those in this case were present. The Department had responsibility for managing water deliveries to the Newlands Reclamation Project to satisfy water rights under an existing decree. The water delivery requirements of the project were met in part by transbasin diversion of water that interrupted flows to the fish habitat in the lower Truckee River and Pyramid Lake on the tribe's reservation.

In response to a challenge by the Pyramid Lake Paiute Tribe to the operating criteria and procedures (OCAP) which the Secretary had promulgated to manage the diversions of water away from the Indian reservation, the court ruled that:

> The Secretary was obliged to formulate a closely developed regulation that would preserve water for the Tribe. He was further obliged to assert his statutory and contractual authority to the fullest extent possible to accomplish this task.

Id. at 256. The Pyramid Lake case provides some guidance to the Department of Interior on the need of the Secretary to fulfill his fiduciary responsibility to the Tribes and his contract obligations to the Project water users. Thus, the Secretary has the discretion to effectively manage Bull Lake Reservoir so that any water made available by such management may be provided for instream flows in Bull Lake Creek, maintenance of water surface elevations in Bull Lake Reservoir, or appropriated by other water users in priority.

Summary and conclusion We understand that the Bureau of Reclamation, the Bureau of Indian Affairs and the Fish and Wildlife Service are consulting about management alternatives for the operation of Bull Lake Reservoir and related regulatory facilities of the Riverton Project. That review could provide a basis for management plans that would meet the obligation of the Secretary to protect project water users, while still providing some water for the fish resources of the Tribes. The process of developing management options for Bull Lake Reservoir should be guided by the following:

1/ Amendatory Contract No. 14-06-600-44A; December 17, 1971; between the United States and the Midvale Irrigation District, for the irrigation of all lands of the Riverton Unit.

1. In the Big Horn River adjudication, the Tribes received no reserved water right for instream flows in Bull Lake Creek or for maintenance of pool elevations in Bull Lake Reservoir.

2. The reserved water rights of the Tribes, quantified on the basis of irrigated agriculture, may be dedicated for fish habitat maintenance.

3. The Tribes have taken no formal action to dedicate their stream flows for fish habitat by using water reserved to them for irrigation by the decision.[6/]

4. The Secretary must comply with the Court Decree in the Big Horn River adjudication and his actions must fulfill existing water rights and comply with the contracts with water users and the Midvale Irrigation District.

5. The Secretary must fulfill his fiduciary responsibility to the Tribes and his contract obligations to the water users so that the project facilities are operated as effectively as practicable.

On August 30, 1988, you presented the Tribes with the results of analyses done by the Bureau of Reclamation on various management alternatives for Bull Lake Reservoir. The analyses reviewed the Tribes' conflicting request for Bull Lake Creek minimum stream flows and minimum elevations in Bull Lake Reservoir and assessed the impacts of various operational alterations. On October 11, 1988, you met with the Fish and Wildlife Service and the Bureau of Indian Affairs to review the operational analyses and to seek further input concerning fisheries goals for Bull Lake Reservoir and Bull Lake Creek. I urge you to continue to seek methods whereby the Secretary can fulfill his contractual obligations to the project water users and still operate Bull Lake Reservoir in a manner which will better meet desired stream flows or to maintain a more suitable Bull Lake Reservoir elevation.

Finally, this memorandum is addressed only to the issues associated with the Bull Lake Creek and Bull Lake Reservoir. In the event other management issues arise elsewhere on the Wind River system which involve use of the reserved water right for instream flow maintenance in a manner that affects Reclamation project operations, we will be available to address them with you.

6/ The procedure the Tribe should use to set aside instream flows from their reserved right is undetermined. Practical issues regarding notice, if any, to other water users, quantification, season of use, permanence, and impacts, if any, on other water users will need to be considered when such a dedication occurs.

If you have any questions, please feel free to call us at FTS 585-6331.

Richard K. Alcorn
For the Field Solicitor

cc:
Associate Solicitor, Division of Indian Affairs, Washington
Associate Solicitor, Division of Conservation and Wildlife
Associate Solicitor, Division of Energy and Resources, Washington
Regional Solicitor, Portland
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Hoopa Valley Business Council

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Wilfred K. Colegrove
Chairman

HOOPA VALLEY TRIBE
Regular meetings on 1st & 3rd
Thursdays of each Month

/

TESTIMONY OF THE HOOPA VALLEY TRIBE:

TRINITY RIVER STREAMFLOWS

Before the Special Committee on Investigations,
Senate Select Committee on Indian Affairs

Hearing of May 16, 1989

Presented by:
Stephen H. Suagee
Attorney for the
Hoopa Valley Tribe
Hoopa, California

Good morning. My name is Steve Suagee and I am the on-reservation legal counsel for the Hoopa Valley Tribe of northern California. The Tribe appreciates the significance of this Special Committee's mission, and is grateful for an opportunity to present its perspective on Bureau of Reclamation mismanagement of fishery streamflows.

The Hoopa Valley Reservation comprises some 89,000 acres of land, making it the largest reservation in California. Today, the Tribe has about 1900 members, over 1000 of whom live on the Reservation. Since aboriginal times, and continuing today, one of the primary resources of the Tribe has been the salmon of the Trinity River. We are here today because this resource is presently being threatened by mismanagement of the massive Central Valley (federal) and State Water Projects.

While the Hoopa Tribe has only just begun to develop a commercial fishery, Trinity River salmon provide a crucial subsistence fishery for our tribal members, many of whom are at or below the federal poverty line. In addition, salmon play a major role in the Tribe's culture and religious practices.

Upriver from the Hoopa Valley Reservation are the Bureau of Reclamation's (BOR) Trinity River Division dams, from which Reclamation diverts over 75% of the Trinity River's annual flow

to its Central Valley Project for power, irrigation, and other purposes. Unfortunately, Reclamation has ignored its trust duties to provide for Trinity instream flow needs as identified by the Tribe and the Fish and Wildlife Service (FWS). This may result in part from the Tribe's and the BIA's virtual exclusion from any Central Valley Project (CVP) policy involvement during the 1980s. As a result, Reclamation has substantially reduced Trinity River streamflows in three of the last five years, thereby threatening the habitat and migration flows essential to the future of Trinity River salmon runs. In the mean time, Central Valley Project customers have enjoyed full deliveries of water from the Trinity River. Moreover, Reclamation is planning to sell even more water from the Trinity River without having demonstrated that a surplus exists. Reclamation has thus frustrated the Interior Department's ability to fulfill its trust obligations to the Hoopa Valley Tribe, and has aggravated the Department's institutionalized conflict in interest.

Last fall's enactment of the Hoopa-Yurok Settlement Act, P.L. 100-580, confirmed the Hoopa Valley Tribe's exclusive ownership and government of the Hoopa Valley Reservation and provided a positive Congressional solution to 30 years of paralysing litigation regarding the nature of Indian rights in

the Reservation. At long last the Hoopa Valley Tribe is in a position to pursue expanded economic development for its members. One of the Tribe's foremost goals is to establish a tribal commercial fishery in the Trinity River, and we are currently developing a harvest plan for a trial commercial fishery on this year's spring run of chinook salmon. Reclamation's ongoing disregard for Trinity streamflows (which is the subject of an administrative appeal currently before the Secretary), together with its plan to divert and sell even more water from the Trinity River, may well thwart the economic development of the Hoopa salmon fishery.

The general principles for resolution of Trinity River streamflow problems are relatively straightforward (and are applicable, we believe, to similar situations elsewhere in Indian country, including the Wind River situation which is the main subject of today's hearing). Reclamation must recognize that its trust duties to protect instream flows are real and substantial. First and foremost, it should provide the Tribe and the Congress a detailed accounting of how much water is diverted from the Trinity, where it goes, and for what purposes. Most of the relevant data should be readily available in the CVP operations computer, but thus far Reclamation has presented it in incomplete

and fragmented form in various operational documents and environmental review processes. Complete accounting data should be incorporated into all planning documents associated with the Trinity River Division, including the current water marketing plan, and shared freely with the Tribe, the BIA, and FWS.

Interior should direct that the Tribe, the BIA, and FWS be permitted to assume their rightful roles in streamflow policy matters. As it is, Reclamation co-opts the fisheries expertise of the FWS and the tribal rights expertise of the Tribe and BIA.

Ultimately, all of these Interior agencies and the Tribe should develop an agreement setting forth a long term coordinated operation policy for the Trinity River Division that meaningfully protects the streamflows necessary for restoration and maintenance of natural salmon runs at their pre-dam levels.

The Hoopa Valley Tribe is pleased that this Committee is investigating problems in Indian country that result from Interior Department conflicts in interest. We thank you for the opportunity to present our views on how this basic dilemma affects the Trinity River streamflows that are critical to the Tribe's cultural and economic future.

I. Opening Chief Thurston

Thank you Mr. Chairman. On behalf of the Sac and Fox Nation we appreciate the opportunity to appear before the Special Investigating Committee an important issue which are of great concern to the Sac and Fox Nation. First, we believe that the overlapping nature of federal agency jurisdiction on our reservation frequently complicates and impdeds the effective management of our government. When you look at the inconsistencies and our lapping of the Bureau of Indian Affairs and other federal agencies it is a wonder we've made the progress of our Nation's government to accomplish the established federal policy of Indian self-government and self-determination.

To furtner introduce my self a brief back ground; prior to my election as Chief August 1987 I worked in the oil and refining business as a manger and Vice-President of different companies. I served on the Sac and Fox Business Committee 1958-1963. Elected Chief 1963 and served until 1973. I have a B.S. degree in education from Central State University.

I would like to introduce, for the record, other members of the Sac and Fox Nations Business Committee: 2nd Chief, Gaylon R. Franklin; Secretary, Mary F. McCormick; Councilman, Thomas Morris who are not present today due to otner duties. Our Government must continue to operate therefore they could not be present due to other duties.

Mr. Truman Carter, Treasurer, Sac and Fox Nation is present and will appear before you today, also, appearing with me today is G.W. Rice, Sac and Fox Legal Council; Jim Welsh, Realty Director and Mr. Curtis Canard, Consultant, President of Tribal Geotechnical Services, Inc.

II. History

I also want to give you a brief history of the Sac and Fox Nation. The Sac and Sauk or people of the yellow earth, and the Fox or Mesquakie or people of the red earth, began as two separate but neighboring tribes within the eastern peninsula of Michigan. Thru a series of twenty (20) treaties with the United States and the sovereign Sac and Fox Nation we were removed from your home land south to Indian Territory. Our first treaty was signed January 9, 1789, and the last February 18, 1857, which established our final reservation in Indian Territory, now the State of Oklahoma. Our Oklahoma reservation by treaty of 1857 consisted of 750,000 square miles of lands in portions of what is now Payne, Lincoln and Pottawatomie counties.

On April 6, 1885, our first written constitution was adopted which setforth our government and laws. The constitution predated the State of Oklahoma.

In 1937 another constitution was adopted and which was amended on various occasions, as needed which served until June 19, 1987. On June 19, 1987, a constitution which superseded the 1937 constitution, was approved by the Assistant Secretary - Indian Affairs along with the Federal Corporation Charter of the Sac and Fox Nation to further establish our sovereignty.

(Attach Constitution and Charter - History - Jan Vassar - article Lincoln Co. News)

III. Purpose of Appearance

Now the purpose of our appearance before you today. The Sac and Fox Nation faces a critical problem of contamination damage to the vamosa aquifer which was the deep fresh water supply. Contamination of fresh water caused by underground injection of salt water for secondary recover of oil, gas, and brim disposal. This damage caused by the injection under high pressure of 63,000,000 lbs. salt water injected into twenty six (26) oil wells drilled into the prue sandstone at a depth of approximately 3,000. The injection or water flood began in 1951 and is contaminating.

At a Special Business Committee meeting, Chief McCornick presiding, on April 21, 1977, held at Shawnee, Oklahoma, the Sac and Fox Tribe of Indians of Oklahoma by Resolution SF-77-37 requested the United States Government bring suit on benalf of the Sac and Fox Tribe to recover actual and permanent damages resulting from exploration for and recovery of minerals on the trust land of the tribe (SF-77-37 attached). This resolution was followed by seven contamination studies 1st of which was 1976 for damages above and below ground performed by Consulting Engineering and Geologic Company's by contracts with the BIA and EPA. The latest as completed March 1989 performed by Tribal Geotechhical Services, Inc. All reports have been given to BIA and all reports identify damages to fresh water supply brought about by improper operation by drilling and injection methods performed by the oil companies with apparent BIA concern. (Attached)

The latest report was to update the previous reports which began twelve years ago that set in a file or on a desk some of which say the BIA were misplaced and needed to be brought up-to-date. The latest report is in an we again ask the BIA to file suite to recover damages and to replace long last fresh water. The ball is in your hands to complete this time, we will not give up, do your duty as mandated by law. Fresh quality water is a very precious resource that will enable the Sac and Fox nation to continue to develop our Reservation lands. Mr. Chairman we ask this committee assistant to bring forth immediate action by the BIA to collect damages and replace our fresh water. (Contract #'s Attached)

IV. Accomplishments

In our desire to develop our reservation lands we began in the late 1960's to plan and construct facilitie for our Nations members. A recreation area began, a deep water well drilled and completed in 1954 which provided a good supply but upon Testing by Indian Health Service it was found to be nign in Chlorides and not suitable for drinking and the shallow uncontaminated water was insufficient for our needs.

A new awaking began in the 1970's with settlement of land claims against the United States that has continued and will continue. In 1972 we needed water and with the assistance of the Indian health Service a new well field

was developed approximately to miles south of reservation lands and a water system was installed to furnish a dependable supply of good quality drinking water. Also in 1973 the Sac and Fox built new community building from tribal funds and was the beginning of a new use of tribal funds for programs for the benefit of all members.

Since this start in 1974 the reservation has grown from only land value to where our capital improvements now value $3,069,811.00 we have spent $30,000.00 on land clean up and improvement, $10,000.00 to build a lake in July 1979, not sufficient for fresh water need. We have improved a portion of our lands, not prone to surface flooding or severely damaged by unsound drilling and production, to be attractive by a campground project on which our annual pow wow is held, a rodeo ground, a RV and Mobile Home park. In addition our Nation Capital, Health Clinic, National Library, Community Building and Food Distribution Warehouse now operate on reservation lands. All this on lands the produce contaminated water and a off reservation water supply that has to be transported at high cots. With adequate fresh quality water and the unique status to our reservation offers many benefits to industry to locate. This is another of the long range goals that will enable the Sac and Fox to continue self sufficiency and self determination as a sovereign Nation.

From our Reservation office complex Stroud, Oklahoma we operate twenty (20) programs contracted with various federal agencies for a total of $2,134,211.00 and also use our own Nations funds to provide program services for our members which total $2,772.590.00 (list attached)

In addition in 1966 we established the Sac and Fox Housing Authority which today operates 493 units, ten (10) employees with assets in excess of $40,000,000.00, the Sac and Fox Industrial Development Commission established in 1983 operates Sac and Fox Industries, Ltd, and been successful in promoting a $125,000,000.00 bond issue for essential governmental services and on March 1989, was awarded a $29.9 million contract by the Department of Defense, the first major military contract to an Oklahoma based Indian Corporation. We are also in the completion stage of a 4,000 sq. ft. Community Service Center.

The Housing Authority, Industrial Development Commission and Community Serve center is located in Shawnee, Oklahoma approximately forty (40) miles from the Nations office due to office space and water supply.

Mr. Chairman, the Sac and Fox Sovereign Nation consisting of 228 members as of May 14, 1989, may be small in numbers but a giant of will and determined to over come this critical issues we face. Our removal history from our homelands in the Great Lakes to Oklahoma has been one of survival. Although the year's have gone by since a new reservation has been established in Oklahoma our government has been one of accomplishment we still face critical issues some of which I have related to you today. We still have issues that will be brought out by further testimony today. As I stated the ball is with the BIA who has Federal responsibility, it is not a game to the Sac and Fox Nation.

As to question of reservation status of our Oklahoma lands please refer to: Treaty with The Sauk and Foxes February 18, 1967, Article 6 and 7 (attached).

Mr. Chairman, this concludes my prepared remarks, I will be happy to respond to any questions which you or the members may have.

The Sac and Fox Nation wishes to express its appreciation for your invitation to appear before you today and invite you to visit our Government.

Thank you

Chief Elmer Kanatowa

G. William Rice, P.C.
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May 11, 1989

The Honorable Senator Daniel K. Inouye
The Honorable Senator John McCain
The Honorable Senator Dennis DeConcini
The Honorable Senator Thomas A. Daschle
Senate Select Committee on Indian Affairs
Special Committee on Investigations
United States Senate
Washington, D.C. 20510-6450

Re: Testimony on Behalf of
The Sac and Fox Nation

Gentlemen:

I am pleased today to offer testimony on behalf of the Sac and Fox Nation with respect to the trust responsibilities of the United States, and the implementation thereof by the Bureau of Indian Affairs and other agencies within the Interior Department. By way of background, I should state that I am a Cherokee/Pawnee Indian. My wife and children are enrolled citizens of the Sac and Fox Nation. As an attorney, I serve as the Attorney General of the Sac and Fox Nation. In addition, I serve as the Chief Justice of the Supreme Court of the Citizen Band Potawatomi Indian Tribe in Oklahoma, as Attorney General for the Kickapoo Tribe of Oklahoma, as tribal attorney for several other tribes in Oklahoma, as Adjunct Associate Professor of Political Science at the University of Oklahoma, and as a Hearing Judge for the Oklahoma State Board of Education and Oklahoma Bar Association with respect to teacher termination due process hearings.

The most basic principle of Indian Law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which have never been extinguished. The statutes of Congress then, must be examined to determine the express limitations placed upon tribal sovereignty rather than to determine its sources or positive content.[1] As separate sovereigns pre-existing the United States, the United States Constitution has repeatedly been held not to apply to, or limit, the Tribe's powers of self-government.[2] Indian tribes, then as distinct political communities, retain their original natural rights of self-government,and remain a separate people with the power of regulating both their members and other persons or entities within their territory, especially when the non-Indians have some impact on the tribe or its members.[3]

It follows, that Indian Tribes have the authority to enforce their own laws in their own forums as to both Indians and non-Indians.[4] The inherent power to tax, regulate, and exclude non-Indians has been consistently upheld, and the widely held understanding of the federal government has always been that federal laws have not worked a divestiture of such powers.[5] Therefore, a tribe may regulate, through taxation, licensing, or other means[1], the activities of Indians or non-Indians who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements and clearly may do so where the conduct of the non-Indian threatens or has direct effect on the Tribe or its members.[6]

Prior to 1890, all government in Oklahoma was tribal government, and the Tribes residing in Oklahoma, including the Sac and Fox Nation, enjoyed the full cornucopia of powers possessed by Indian tribes generally. The beginning of non-tribal government in Oklahoma came in 1890 with the advent of the Territory of Oklahoma. The Oklahoma Organic Act, Act of May 2, 1890, ch. 182, 26 Stat. 81 (1890), contained two provisos of significance. Section 1 of that Act specifically protected all the rights of Indian Tribes under the laws, agreements, and treaties as if the Territory of Oklahoma had never been created.[7] Section 12 of that Act extended exclusive jurisdiction for tribal courts in actions between members of the same Tribe while sustaining their tribal relations even though not within the Indian Country.[8]

It is clear that the Sac and Fox tribal government that predated and preceded the creation of the Territory of Oklahoma was vested with exclusive civil and general criminal jurisdiction over all persons and property within its territory. The Sac and Fox Nation in fact exercised such jurisdiction through their Constitution of 1885 and the tribal laws passed pursuant thereto. Such authority has been specifically recognized by treaties with the United States. Treaty of Fort Harmar, Jan. 9, 1789, Arts. VII, IX, 7 Stat. 28. By enacting Sections 1 and 12 of the Organic Act, Congress clearly intended to preserve exclusive federal and tribal jurisdiction undiminished by the creation of

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1. In recognition of the authority of the Sac and Fox Nation, as well as other Tribes in western Oklahoma, to exercise these governmental prerogatives, the Secretary of the Interior has established a Court of Indian Offenses as an interim Court to enforce Tribal law until the Tribes establish their own "pure" tribal court systems. 25 C.R.R. §11.1(a)(29)(1981). The Sac and Fox Nation now has its own pure tribal court established by its Constitution as a separate and co-equal branch of the tribal government invested with the judicial powers of the Tribe, including specifically the power of judicial review.

the new Territory, and later the new State.[9] Moreover, this bar to state authority coincides with the creation of the jurisdictional competitor. From a reading of this statute, it can be said that the Territory and State have ab initio been preempted in this area.

In 1953, Congress enacted a special jurisdictional statute popularly known as Public Law 83-280. Act of August 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321, 28 U.S.C. § 1360). Public Law 83-280 authorizes States to assume civil and criminal jurisdiction over Indian country within their boundaries with certain exceptions relating to the Indians therein. Essentially, PL-280 is a congressional prescription for the assumption of jurisdiction by the States over matters arising in Indian country. The significance of PL-280 is that the Supreme Court in Kennerly v. District Court, 400 U.S. 423 (1971) found that this statute is a "governing Act of Congress" preempting State action in those states in which the statute is not in effect.

This ruling was followed in McClanahan v. Arizona Tax Commission, 411 U.S. 164, where the court noted that States must follow the congressional prescription and failure to do so results in an absence of State subject matter jurisdiction concerning matters affecting Indians which arise in the Indian Country. The court in both Kennerly and McClanahan found that neither Arizona nor Montana had taken the required affirmative action to assume the claimed jurisdiction. Within Indian country then, State jurisdiction is preempted both by the general federal protection of tribal self-government -- the Worcester doctrine-- and by specific federal statutes relating to civil and criminal jurisdiction within Indian country.[10] With regard to the particular question of the extension of State jurisdiction over civil actions involving Indians and arising in Indian country, there are "governing Acts of Congress," i.e. Sections 1 and 12 of the Oklahoma Organic Act, Pub. L. 83-280, 67 Stat. 588, and 18 U.S.C. § 1151, that control the result.[11]

Oklahoma has not been granted, nor did it choose to assume civil jurisdiction over Indian country either under the Act of August 15, 1953, or under Title IV of the Indian Civil Rights Act of 1968. Oklahoma has neither amended its constitution nor secured the consent of the Indians affected.[2] No federal statute

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2. In Ahboah v. Housing Authority of the Kiowa Tribe of Indians, 660 P.2d 625 (Okla. 1983), the Oklahoma Supreme Court stated: "The Kiowa Tribe has not assented to the assumption of jurisdiction by the State of Oklahoma. Therefore Oklahoma to assume jurisdiction under Public Law 280 must have done so under the original 280 Act before the amendment by the Civil Rights Act

sanctions the jurisdictional intrusion which is wrought when the State attempts to exercise jurisdiction over persons or property within the jurisdiction of the Sac and Fox Nation. In the absence of compliance with 25 U.S.C. § 1322(a), (P.L. #83-280, as amended), Oklahoma cannot exercise civil jurisdiction over persons in the Indian country within the territorial limits of the Sac and Fox Nation.

Indian country is defined in 18 U.S.C. § 1151.[12] Research has revealed no court decision holding that the reservation boundaries of the Sac and Fox Nation has been extinguished. Trust allotments are, by definition, jurisdictionally Indian country. They are clearly Indian allotments, "the Indian titles to which have not been extinguished, including rights-of-way running through the same."[13] It also appears that the privately purchased or acquired properties of the Sac and Fox Nation and its agencies are Indian Country. The Tenth Circuit, following United States v. Sandoval 231 U.S. (1913), acknowledged the proper test as to whether a particular area constitutes a dependant Indian community in United States v. Martine 442 F.2d 1022 (10th Cir., 1971):

> The trial court received evidence as to the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of governmental agencies toward the area.[3]

Other non-trust areas set aside for Indian use in Oklahoma have been declared to be Indian county[14]. Finally, title to such areas should be taken in trust for the tribe or Indian individual pursuant to the Act of June 18, 1934, ch. 576, § 5, 48 Stat. 985 (1934) (25 U.S.C. §465) which states in pertinent part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations . . . for the purpose of providing land for Indians.
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> . . . .

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of 1968." The Court went on to determine that the State of Oklahoma had not acquired jurisdiction pursuant to the original Public Law 280.

3. It has clearly been held that areas owned by the tribes or the federal government and used for Indian purposes constitute dependent Indian communities. Sandoval, supra; United States v. McGowan 302 U.S. 535, 538 (1938).

> Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

The Court in DeCoteau further commented that § 1151 (c) of Title 18 of the United States Code "contemplates that isolated tracts of Indian country may be scattered checkerboard fashion over a territory otherwise under State jurisdiction." The legal effect, therefore, of a finding that a particular area is Indian country within the definition cast by 18 U.S.C. § 1151 should be to generally preempt State jurisdiction over conduct occurring within that Indian Country, whether by an Indian or a non-Indian, which affects the tribe and its members even in a remote fashion.

From the foregoing points and authorities the following conclusions can be drawn. First, the Sac and Fox Nation at the time of the creation of the Territory of Oklahoma was possessed of all the general and inherent governmental authority of any other Indian Tribe. Secondly, the creation of the Territory of Oklahoma, and later the State of Oklahoma had no adverse effect upon the governmental powers of the Tribe, and there is no legal reason that the Sac and Fox Nation cannot exercise full powers of government over all persons and property within the Indian Country of the Sac and Fox Nation. Due to the lack of State subject matter jurisdiction, the State will not have the power to tax, levy upon, control the rights to possession of, or otherwise effect persons or property within the tribal jurisdiction who are subject to the laws of the Sac and Fox Nation.

In other words, the Sac and Fox Tribe, in its governmental authority, occupies the same dependant domestic nation status as other Indian Tribes generally thought of as classical "reservation tribes", although it remains to be determined exactly what jurisdictional area is retained by the Sac and Fox Nation with respect to its original reservation boundaries in Oklahoma. The increasing exercise of the Sac and Fox Nation's authority through its Courts and Codes of law is simply a normal outgrowth of the Tribe's governmental responsibilities which have been dormant, not due to any legal reason, but due to the confusion regarding the powers of Indian tribes in Oklahoma.[15]

The foregoing summary is critical to the understanding of the problems the Sac and Fox Nation faces with respect to the enforcement of the federal government's trust responsibilities. During the period between 1891 and 1906, the Bureau of Indian Affairs demanded and obtained the destruction of the Sac and Fox Constitutional government. This action was apparently taken based upon the allotment of the Sac and Fox lands in 1891, and the Bureau of Indian Affair's conclusion that allotment made the

allottee subject to territorial or state law instead of tribal law. After the Supreme Court decision in In Re Heff 197 U.S. 488 (1905) agreed with the Bureau's interpretation, Congress promptly amended the General Allotment Act to provide that State jurisdiction would not apply until after the end of the trust period. The Supreme Court overruled that decision in United States v. Nice 241 U.S. 591 (1916) recognizing that it (as well as the Bureau of Indian Affairs) had misread the intention of Congress.

However, the Bureau of Indian Affairs offices in Oklahoma, and the Central Office with respect to Indian Tribes in Oklahoma, apparently have never gotten the message. With few exceptions, the Bureau of Indian Affairs has historically refused to recognize Tribal powers of self-government concerning the Tribe's in Oklahoma until each governmental act has been recognized as valid in the federal courts[16], preferring instead to default jurisdiction and authority to the State of Oklahoma. I have strong reason to believe that local Bureau of Indian Affairs agencies have at times provided assistance and "coaching" to litigants attempting to defeat the exercise of tribal powers of self-government. For instance, I have several times received, attached to briefs supporting such litigants, documents transmitted from the Anadarko Area Office to the Shawnee Indian Agency, documents which in my opinion should not have been released pursuant to the Privacy Act and the trust relationship of the United States with the Tribes. Further, I have encountered situations wherein litigants have raised issues in lawsuits which have been "privately" discussed with Bureau personnel, issues which are so obscure to the normal practice of law that it is doubtful they could have been raised as soon as they were without Bureau help.

Further, the Bureau of Indian Affairs seems reluctant to take the initiative to protect tribal and individual lands and resources when non-Indian interests are at stake. One Sac and Fox Tribal lease contained a provision that stated that any assignment or conveyance of an interest in the lease without Secretarial approval was a material and substantial breach of the terms and conditions of the lease and cause for cancellation thereof. The Tribe, after having an oil company ask for a spot to drill a well on "their" lease that they had "bought" from the lessee of record requested the Superintendent to investigate or to give them money to obtain an abstract from the county records to investigate the ownership status of the lease. This request was denied because the BIA was supposed to have all the important records.

After the Tribe expended its own monies to compile the abstracts from the county clerk's records, it was ascertained that the lessee of record had in fact assigned a part of the lease to a company who had in turn assigned that part to numerous

other parties, and who had in fact mortgaged the tribal lease to a bank, all without federal approval. Afterwards, it was determined that the proposed assignment had been rejected by the BIA without tribal knowledge because it violated the regulations. However, the BIA advised the companies that the same effect could be had by filing a "designation of operator" with the MMS (then USGS) which was promptly accomplished. The unlawful assignments, however, were made and filed in the county records while the BIA looked the other way, and the BIA never apparently questioned the situation. All of this illegal activity was shrugged off by Interior personnel under the theory that it didn't matter what the company had done since none of these illegal transfers were valid since they had not been approved. When the unlawful assignments were brought to the attention of the Area Director, he was asked whether the Bureau would cancel the lease, foreclose the bond, and assist the Tribe in recovering damages. He declined because it might make the oil company mad, they would appeal, and they might not want any more Indian leases. When presented with the evidence of a material and substantial breach of the terms and conditions of the lease, why was the lessee's bond not promptly foreclosed, maximum penalties imposed, and the lease cancelled? Surely it wasn't because the company followed BIA instructions on how to evade the law, and ended up violating it anyway.

I have had several individual Sac and Fox Tribal members visit with me about their problems getting individual fee land taken in trust. Apparently, they are regularly advised by the Shawnee Agency of the BIA that in order to have their land taken in trust they must prove themselves to be mentally incompetent. These people generally do not have the money to conduct an administrative appeal to the Central Office and then fight a court battle to have their land placed in trust. I have inquired of agency personnel about putting fee land in trust for myself or my wife or children and have received the same advice notwithstanding the clear policy expressed in the Indian Reorganization Act and the Oklahoma Indian Welfare Act to acquire land in trust for Indians. Basically, it appears that the BIA position in Oklahoma is that if you are smart enough to buy land, you are, by definition, too smart to have it placed in trust.

Further, the BIA requires that all fee land come into trust status free and clear of all liens and encumbrances -- even though the title is completely marketable with the lien attached, and even though sufficient authority exists for the approval of a mortgage of the land the instant it is received into trust status. The net result is that Indians in Oklahoma wanting to have their land in trust are the only people who must pay cash for land and prove themselves idiots in order to have it placed in trust. The Muskogee Area Office simply refuses to acquire land in trust unless it was taken out of trust for the construction of a HUD Indian home. The Shawnee Agency Office even

refuses to accept these types of tracts back into trust status. In addition, all such acquisitions must carry title insurance or wait for several months until the Washington Solicitor's Office can do their own title opinion. This extra expense and waiting period makes sense for general federal governmental acquisitions where the land will be subject to the federal quiet title act. However, for Indian land there is no authority for anyone to bring suit to quiet title once the land goes into trust status. Therefore it would seem that title insurance is an unnecessary cost, and additional title opinions past that of the Indian's attorney or the local Solicitor are not necessary and simply constitute another hurdle for land acquisition.

Vice-President of the United States and Senator Charles Curtis was a restricted Indian with land held in trust for him all his life. The BIA has many employees who have trust land. Are they by definition mentally incompetent? Certainly not. Cannot an Indian prefer to live on land which is subject to the laws of his or his family's Tribe rather than under the laws of the State? Every time that an acquisition of trust land is denied or discouraged, the government of the Sac and Fox Nation suffers. The tax base of any government is its breath of life. Every time a tract of land is not placed in trust, the Nation loses one more area from its tax base. The effect on the tax base of the state is one of the items the BIA by its regulations must consider in the decision as to whether to accept a conveyance of land into trust status. Apparently, no consideration is given as to the effect on the Tribal tax base when such acquisitions are denied or discouraged.

Similar situations have existed, at least until recent times with the Regional Solicitor's Office, the Bureau of Land Management, and the Minerals Management Service. Indian people often do not even know that MMS and BLM have anything to do with their leases. The BIA talks to MMS who talks to BLM who talks to the BIA. No one seems to talk to the landowners, who are the last ones to know about assignments, well operations, designated operators, and other important information regarding their land, sometimes including leases granted by the BIA. However, when a landowner desires to obtain information of enforcement of his rights, he is often involved in a three cornered game of catch between MMS, BLM, and BIA with each agency waiting for the other to act, or denying responsibility for action absent the consent of the others. The splitting of data and enforcement obligations between these three entities is extremely inefficient and frustrating for the landowners.

Obtaining production and drilling data from BLM and MMS in order to enforce tribal tax laws is very difficult according to information given to me by the Director of the Sac and Fox Tax Commission. The Principal Chief has received a letter stating that production data from Indian land will not be available

because of the privacy act -- even though that act contains a specific exception for the release of records to a governmental agency which requests them for the exercise of its governmental functions[17]. Clearly the privacy act is no bar to the release of production volumes from particular wells to the Sac and Fox Tax Commission for the purpose of allowing the Tax Commission to make tax assessments under tribal law against non-paying oil companies and to check the accuracy of the volumes being reported by paying oil companies.

However, it appears that the production records of MMS are significantly lower than the production admitted by the oil companies. In comparing answers to interrogatories received from oil company defendants in tribal court tax collection suits with MMS production reports previously obtained, my experience is that the admitted production, in terms of both volumes and dollars, of the oil companies significantly exceeds the production attributed to the same leases by MMS. Further, it appears that BLM and/or MMS do not vigorously control well spacing and the creation of unit operations as required by law, but instead acquiesce in the State agencies decisions regarding these matters. Such action has lately been relied upon by the Supreme Court to justify allowing State taxation within the Indian Country thereby limiting Tribal taxing ability as a practical matter.

The Solicitor's Office has regularly taken the position that Tribe's cannot exercise governmental powers, or can do so only in a severely limited fashion. For instance, the Solicitor attempted to veto the creation of a Sac and Fox Court system even after the Bureau of Indian Affairs Central Office had agreed that the Tribe had the power to create a court. Even though not required by any law, we were informed that the Sac and Fox had to obtain BIA approval of their initial law and order code in order to receive BIA funding for the Court. In an effort to obtain funding expediently, the Sac and Fox adopted the Court of Indian Offenses Code found in Title 25 Part 11 of the Code of Federal Regulations as their initial code, simply changing "Superintendent" to "Principal Chief" or "Business Committee", "Court of Indian Offenses" to "Tribal Court", and so forth. When we went to discuss the proposed law and order code with the Acting Area Director at the Anadarko Area Office, we were informed that the Solicitor had sent a three page letter detailing how the proposed code was inadequate and could not be approved. It was only after we invited the Acting Area Director to lay our proposed code and the CFR side by side on his desk and compare them that we obtained approval of the initial Sac and Fox law and order code.

Other Sac and Fox witness statements will detail the saga of the Sac and Fox groundwater and oil field damages claims which have now languished with the solicitor's office and the other agencies of the Department of the Interior for many years without being resolved. There appears to be no good reason not to pursue

this claim. While apparently the damage to Sac and Fox groundwater and oil resources which the Interior Department allowed to occur cannot be easily reversed, and may take generations to recover in any event, it is apparent that this claim should be vigorously pursued or paid by the United States.

From the larger perspective, however, it should be noted that the Sac and Fox Nation as well as other Indian Tribes in Oklahoma realistically believe that they will obtain no legal help from the United States (and in particular the Interior Department) in attempting to assert or defend their governmental prerogatives or in attempting to protect the resources of the Tribes and their members. The Tribes probably spend approximately 80% of their time and resources simply trying to defend their right to self-government and their minimal resources against encroachment and damage by the State and others, and only about 20% of their resources building and improving tribal government.

The recent Supreme Court case of Cotton Petroleum Corp. v. New Mexico, No. 87-1327 (April 25, 1989, where the Court for the first time in the modern era allowed state law to be applied to a person engaged in commerce with an Indian in the Indian country, in a state not subject to Public Law 83-280, will do nothing but result in further attacks upon the negligible tribal tax base and further skew the resources of the tribes from building a better life for their people and the residents of their respective jurisdictions toward protecting what little remains. The recent departure by the Court from the traditional tribal sovereignty doctrine of Worcester has not been sanctioned by Congress, and such departure should be rejected. It is a case which raises the specter of In Re Heff and cries out for legislative correction.

In the Sac and Fox case, I have been informed by what we believe to be the largest producers of oil and gas within the Tribal jurisdiction that the large majority of their wells will be plugged and abandoned as not economical if both the Tribe's 8% tax and the state's 7.085% tax are applied to the wells. In order to save the wells for the royalty owners, the Tribe is faced with significantly reducing or eliminating the tribal tax on oil and gas production and reducing governmental services, or maintaining the tribal tax rate and loosing both the tax and the royalty for the owners. If the radical result in Cotton Petroleum is applied to all non-Indian businesses within the Tribal jurisdiction, the tribal tax base will crumble. In order to wean the Tribe from the federal dollar and provide true self-determination, the Tribe must have a secure, stable, and substantial tax base. Tribal members simply do not have the resources to start large economic enterprises which can contribute significant tax revenues. Without the ability to attract large scale industry -- which cannot be done when the business runs a significant risk of paying three taxes instead of one or two -- the Tribes are doomed to survival through the

exploitation and eventual demise of their remaining natural resources and reliance upon continued federal dollars. Such a situation should be an anathema, and promptly corrected by Congress. The Congress should mandate a return to the Indian sovereignty principals of Worcester v. Georgia by appropriate amendments to the Indian Reorganization Act, the Oklahoma Indian Welfare Act, and the Self-Determination Act by providing that state law is not applicable in the Indian Country except where specifically permitted by a federal statute.

The damage to the Sac and Fox groundwater and oil resources is done, and is being done. Money can never compensate the Sac and Fox Nation for the destruction of the last few acres of tribally owned land left to them in the aftermath of the allotment era. The only way to adequately compensate for this loss is to replace that which has been destroyed under the "management" of the federal bureaucracy. This will entail land acquisition on a large scale. However, even if Congress would fund such an acquisition program, it will not fix the problem of lack of management.

I pray to God that these hearings are not a prelude to a return to the discredited theory of termination and the destruction of the Bureau of Indian Affairs. Only my respect for the members of this Committee and your past work on behalf of Indian people give me comfort in this regard. The Bureau of Indian Affairs still has a role to fill as manager and trustee. There are many tribes and individuals which need such assistance. However, the problems the Department of the Interior has have been repeatedly documented, and apparently will be again by these hearings. For some Tribes, though, the time has perhaps come for the role of the Secretary of the Interior to be that of a technical advisor and a State Department for Indian Tribes. Perhaps it is time for some Tribes to exercise true self-determination and be permitted to once again control their own territory and resources through the exercise of the authority of their own tribal governments to the extent they choose for themselves.

As the Congress recognized in the Indian Self-Determination Act, Indian people and Indian Tribes desire governmental control over their own destiny, their own lands, the property therein, and the people who chose to live and work with them and otherwise enter into their territory. Indian people are, after all, Indians because of their legal and political status as members of Indian Tribes. Indian Tribes are governments, pure and simple, having the inherent power to make and enforce law except where specifically limited by Congress. In my opinion, most if not all of the problems faced by the Sac and Fox Nation today could be remedied simply by returning clear authority to the Sac and Fox Nation to enact and enforce tribal law within its territory to the exclusion of the State, to recover lands within its original

reservation boundaries and have that land unequivocally recognized as a part of its territory, and by authorizing the Tribal government to exercise the discretion now vested by federal law in the Secretary of the Interior.

In other words, the primary problem with the enforcement of the federal trust responsibility does not appear to be a legal problem but an attitude problem. One of the larger legal problems encountered by Tribes in Oklahoma is the tendency of Congress and the Courts to speak in terms of "reservations" when the term of art defined by statute as the jurisdictional area of a Tribe is "Indian Country". Usually the laws are there to enforce tribal and individual rights, and the discretionary authority exists to provide assistance both to the tribes and to individuals. The real problem with the Department -- as it is with HUD and other federal agencies -- is that the enforcement is lacking and the discretion is often exercised in a way which is inconsistent with tribal goals and legal rights.

The primary obstacles standing between the Sac and Fox Nation and the ability to enforce its own rights, protect its own resources, and provide all the services of any other general government to the residents of its jurisdiction is an adequate tax base with which to provide the necessary funds, and supporting legislation to preclude costly jurisdictional litigation. It is my belief that the Sac and Fox Nation is prepared to be a test case for such a demonstration program as a tribal solution to the trust responsibility problem. Perhaps in the nature of a Self-Determination Contract or a special Sac and Fox Economic Development Act, the following steps could be taken:

1. The Sac and Fox Nation be authorized in its discretion to acquire land within the boundaries of its original reservation in Oklahoma with all such acquisitions by the Sac and Fox Nation or its agencies being a part of the reservation of the Sac and Fox Nation, and subject to exclusive Tribal jurisdiction.

2. That the Constitution, Charter, legislation, regulations, administrative and judicial decisions of the Sac and Fox Nation be given full faith and credit by the United States, every State, and the Indian Tribes to the same extent that they give full faith and credit to the laws of any other entity. (The Indian Child Welfare Act contains a similar provision relative to child custody actions.)

3. That the invitation of the Supreme Court in the Cotton Petroleum case wherein the Court stated "The federal sovereign has the undoubted power to prohibit taxation of the Tribe's lessees by . . the State" be accepted, and that the Sac and Fox Nation be specifically granted exclusive civil jurisdiction (including taxation and regulation) over all persons and property

within the Indian Country (including allotments) described in paragraph 1 above whether now held or hereafter acquired.

4. That Article IX of the Treaty of Fort Harmar, 7 Stat. 28 be adhered to, and the Congress recognize the criminal jurisdiction of the Sac and Fox Nation over all persons within the jurisdiction of the Sac and Fox Nation subject to the limitations imposed and habeas corpus relief guaranteed by the Indian Civil Rights Act, as amended.

5. That the Sac and Fox Nation be authorized specifically to notify the Secretary of the Interior, the Secretary of Health and Human Services, and the Secretary of Housing and Urban Development that it is assuming the responsibilities of either of said Secretaries under any federal statute applicable to the Sac and Fox Nation, whereupon the Sac and Fox Nation would have the authority to exercise such responsibilities on its own behalf or on behalf of its members.

6. That the Secretary of the Interior, the Secretary of Health and Human Services, and the Secretary of Housing and Urban Development be directed to provide technical assistance and information to the Sac and Fox Nation and to assist the Sac and Fox Nation in the exercise of its assumed responsibilities.

7. That the United States, for a period of fifteen years, grant a federal income tax credit, double deduction, or other reasonable tax incentive for businesses or industry which locate during that time period within the tribal jurisdiction now held or hereafter acquired within the original reservation boundaries.

Given these seven items, the Sac and Fox government could expect to be self-supporting within fifteen years, and able to provide for its own protection and regulation. If items five and six were made a part of a Self-Determination type contract which the appropriate Secretary was mandated to accept, then the amount of authority exercised by the Sac and Fox could be fine-tuned as experience indicates necessary. Obviously success in such an undertaking would be in everyone's best interest, and could be duplicated by those Tribes which are able and desirous to do so.

Thank you, Gentlemen, for the opportunity to present my views to the Committee.

Very Truly Yours,

G. William Rice
Attorney General
Sac and Fox Nation

GWR:rr

cc: chrono
107.62
Principal Chief, Sac and Fox Nation

ENDNOTES

1. Cohen, Handbook of Federal Indian Law 122, (1945); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 71 L.Ed.2d 21 (1982) (inherent power to tax, regulate, and exclude non-Indians); United States v. Montana, U.S. 544, 67 L.Ed.2d 493 (1981) (inherent power to exercise civil jurisdiction and regulate non-Indian activities on Indian lands, including leases); Washington v. Confederated Tribes, 447 U.S. 134, 65 L.Ed.2d 10 (1980) (inherent power to tax); United States v. Wheeler 435 U.S. 313, 55 L.Ed.2d 303 (1978) (power to exercise criminal jurisdiction over Indians); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 L.Ed.2d 106 (1978) (membership, and immunity from suit by reason of sovereign immunity); Roff v. Burney 168 U.S. 218, 42 L.Ed 442 (1897) (membership); Jones v. Meehan 175 U.S. 1, 44 L.Ed 49 (1899) (inheritance); United States v. Quiver 241 U.S. 602, 60 L.Ed 1196 (1916) (domestic relations); Worcester v. Georgia 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832) (power to exclude nonmembers).

2. Talton v. Mayes 163 U.S. 376, 41 L.Ed 196 (1876); Santa Clara Pueblo v. Martinez 426 U.S. 49, 56 L.Ed.2d 106 (1978) Twin Cities Chippewa Council v. Minnesota Chippewa Tribe 370 F.2d 529, 533 (8th Cir. 1967); Native American Church v. Navajo Tribal Council 272 F.2d 131 (10th Cir. 1959); Martinez v. Southern Ute Tribe 249 F.2d 915 (10th Cir. 1957) cert. den. 356 U.S. 960, 2 L.Ed.2d 1067 (1958); Groundhog v. Keeler 442 F.2d 674 (10th Cir. 1971).

3. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed 483 (1832); United States v. Mazurie 419 U.S. 42 L.Ed.2d 706 (1975); United States v. Kagama 118 U.S. 375, 30 L.Ed 228 (1886); United States v. Wheeler 435 U.S. 313, 55 L.Ed.2d 303 (1978); Santa Clara Pueblo v. Martinez 426 U.S. 49 56 L.Ed.2d 106 (1978); Twin Cities Chippewa Council v. Minnesota Chippewa Tribe 370 F.2d 529, 533 (8th Cir. 1967); Native American Church v. Navajo Tribal Council 272 F.2d 131 (10th Cir. 1959); Martinez v. Southern Ute Tribe 249 F.2d 915 (10th Cir. 1957) cert. den. 356 U.S. 960, 2 L.Ed.2d 1067 (1958); Groundhog v. Keeler 442 F.2d 674 (10th Cir. 1971); United States v. Montana 450 U.S. 544, 67 L.Ed.2d 493 (1981); Washington v. Confederated Tribes 447 U.S. 134, 65 L.Ed.2d 10 (1980); Merrion v. Jicarilla Apache Tribe 455 U.S. 130, 71 L.Ed.2d 21 (1982); F.Cohen, Handbook of Federal Indian Law 122-23 (1945).

4. Williams v. Lee 358 U.S. 217, 3 L.Ed.2d 251 (1959); Fisher v. District Court 424 U.S. 382, 47 L.Ed.2d 106 (1976); Santa Clara Pueblo v. Martinez 436 U.S. 49, 56 L.Ed.2d 106 (1978); Merrion v. Jicarilla Apache Tribe 445 U.S. 130, 71 L.Ed.2d 21 (1982). Cardin

v. De La Cruz 671 F.2d 363 (9th Cir. 1982) cert. den. ___ U.S. ,74 L.Ed.2d 277 (1982). New Mexico v. Mescalero Apache Tribe 462 U.S. 324 (1983).

5. Washington v. Tribes 447 U.S. 134, 152-53, 65 L.Ed.2d 10, 28-29 (1980); Montana v. United States 450 U.S. 544, 565-66, 67 L.Ed.2d 493, 510,11 (1981); Merrion v. Jicarilla Apache Tribe 455 U.S. 130, 71 L.Ed.2d 21 (1982).

6. Washington v. Confederated Tribes 447 U.S. 134, 153-55, 65 L.Ed.2d 10, 28 (1980); Williams v. Lee 358 U.S. 217, 3 L.Ed.2d 251 (1959); Morris v. Hitchcock 194 U.S. 384, 48 L.Ed 1030 (1904); Fisher v. District Court 424 U.S. 382, 47 L.Ed.2d 106 (1976); Buster v. Wright 135 F. 947 (8th Cir. 1905) appeal dism. 203 U.S. 599, 51 L.Ed 334 (1906); Maxey v. Wright 34 S.W. 807 (Ct. App. Ind. Terr.) aff'd. 105 F. 1003 (8th Cir. 1900); Barta v. Oglala Sioux Tribe 259 F.2d 553 (8th Cir. 1958); Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe 634 F.2d 474 (9th Cir. 1980); Cardin v. De La Cruz 671 F.2d 363, 366 (9th Cir. 1982) cert. den.___ U.S. ___, 74 L.Ed.2d 277 (1982); Knight v. Shoshone and Arapaho Tribes 670 F.2d 900 (10th Cir. 1982); Ortiz-Barraza v. United States 412 F.2d 1176, 1179 (9th Cir. 1975); Confederated Salish and Kootenai Tribes v. Namen 665 F.2d 951, 963-64 (9th Cir. 1982); Colville Confederated Tribes v. Walton 647 F.2d 42 (9th Cir. 1981).

7. Section 1, in pertinent part, states:

> Provided, that nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements and treaties of the United States, or to impair the rights of person or property pertaining to said Indians, or to affect the authority of the government of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights which it would have been competent to make or enact if this Act had not been passed.

8. Section 12, of that Act defining the jurisdiction of the Territorial District Courts, declares in pertinent part:

> Provided, that nothing in this Act contained shall be so construed as to give jurisdiction to the courts established in said Territory in controversies arising between Indians of the same tribe, while sustaining their tribal relation.

9. The Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267, in Section 1 continued this federal and tribal protection through the creation of the State. Section 1 provides:

> That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any low or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed.

10. McClanahan v. Arizona Tax Commission, 411 U.S. 164, 36 L.Ed.2d 129, (1973); 25 U.S.C. §§ 1321-1326; § 1[illegible] Oklahoma Organic Act; United States v. Littlechief, No. 76-20[illegible]-D (W.D. Okla. Nov. 7, 1977) followed and reprinted in State v. Littlechief-, 573 P. 2d 263 (Okla. Crim. App. 1978); 18 U.S.C. § 1151; Kennerly v. District Court, 400 U.S. 423, 27 L.Ed.2d 507, (1971).

11. On Indian jurisdiction in Oklahoma, See, The Journey from Ex Parte Crow Dog to Littlechief: A Survey of Tribal Civil and Criminal Jurisdiction in Western Oklahoma, 6 Am. Indian L. Rev. 1.

12. This Statute provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter [18 U.S.C. §§ 1151 et seq.], means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within of without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

13. DeCoteau v. District County Court, 420 U.S. 425, 43 L.Ed.2d 300, (1975); United States v. Littlechief, No. 76-207-D (W.D. Okla. Nov. 7 1977), followed and reprinted in State v. Littlechief-, 573 P. 2d 2653 (Okla. Crim. 1978); see also, Oklahoma Attorney General Opinion No. 78-176; Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma, 618 F. 2d 665 (10th Cir. 1980); Ahboah v. The Housing Authority of the Kiowa Tribe of Indians, 54 O.B.A.J. 581 (NO. 53, 646 March 1, 1983); United States v. Ramsey, 271 U.S. 467, 70 L. Ed. 1039, (1926) (restricted allotment).

14. C.M.G. v. State 594 P.2d 798 (Okla. Crim. 1979), Cert. den. 100 S. Ct. 524. In United States v. South Dakota 665 F.2d 837 (8th Cir., 1981) affirm'g United States v. South Dakota 7 I.L.R. 3148 (D.S.D., Sept. 8, 1980)(unpublished in official sources) the Eighth Circuit held that a HUD Indian housing project in the city of Sisseton, South Dakota constituted a dependant Indian community. Incidentally, the Sisseton-Wahpeton Sioux Tribe, the Tribe involved in United States v. South Dakota, was also the Tribe involved in DeCoteau v. District Court, discussed post, which determined that the reservation of the Sisseton-Wahpeton Tribe had been extinguished in 1891. Notwithstanding the termination of their reservation, DeCoteau held that the Tribe retained their police powers over the remainder of the Indian Country of the Tribe, and Untied States v. South Dakota further recognized the capability of a tribe without a reservation to establish a housing authority pursuant to tribal law. This case also recognized that the projects of such a housing authority would constitute Indian Country. See also, United States v. Mound 477 F. Supp. 156 (D.C.S.D. 1979).

15. See, generally, Cohen's Handbook of Federal Indian Law 770-797.

16. Harjo v. Kleepe 420 F. Supp. 1110 (D.D.C. 1976), aff'd sub nom. Harjo v. Andrus 581 F.2d 949 (D.C. Cir. 1978); Logan v. Andrus 640 F.2d 269 (10th Cir. 1981); The Muscogee (Creek) Nation v. Hodel 851 F.2d 1439 (1988) cert. den. 109 S.Ct. 795 (1989). See, also, Pipestem & Rice The Mythology of the Oklahoma Indians: A Survey of the Legal Status of Indian Tribes in Oklahoma, VI Amer. Ind. L. R. 259 (1978).

17. This letter, dated April 7, 1989 from Jim Sims, District Manager of the Tulsa MMS Office states in part:

> The Sac and Fox Tribe is not another agency of the Department of the Interior, nor is it any part of the U.S. Federal Government. It is considered a "Sovereign Nation" as your letterhead states and only Congress can order a Federal Agency to assist a "Sovereign Nation."
>
> The Privacy Act of 1974, 5 U.S.C. Section 552a, was

enacted to grant individuals a certain amount of control over information about them, maintained by agencies of the Federal Government. The Privacy act specifically prohibits agencies from disclosing any record contained in a Privacy Act system to any person or Agency without the permission of the individual to whom the record pertains unless the disclosure falls within one of 12 exceptions. All case files with Indian information, including those Federal files with Indian information, are kept proprietary.

....

Admittedly, since certain trust responsibilities have been transferred from the BIA to the Tribes, there would also be a need to have access to addit ɔnal records. However, it is our opinion that Congress or the Secretary of the Interior needs to amend our rules and regulations or direct or authorize BLM to cooperate directly with Sovereign Tribal Nations before oil and gas records regarding restricted Indian Tribal minerals can be sent directly to the Tribes.

Sac and Fox Nation
Route 2, Box 246 Stroud, OK 74079
(918) 968-3526

Principal Chief ELMER MANATOWA
Second Chief GAYLON K. FRANKLIN, SR.
Secretary MARY F. McCORMICK
Treasurer TRUMAN CARTER
Committee Member THOMAS MORRIS, JR.

Mr. Chairman and Members of the Committee:

My name is Truman Carter. I am Treasurer of the Sac and Fox Nation and am an attorney with the firm of Pipestem, Carter and Lamirand in Norman, Oklahoma. I received my law degree from the University of Oklahoma College of Law, and my undergraduate degree from OU in Law Enforcement Administration.

Some of my recent past activities include the following:

- organized and administered a comprehensive tribal taxation system, serving as its Tax Director from 1982 until 1987. (the first in Oklahoma since statehood).
- involved in the development and implementation of a Sac and Fox tribal police and court operation, 1984 - present.
- presently serving as an Assistant Attorney General in the tribal court system.
- served as Land Acquisitions Officer in Charge of the Sac and Fox Tax Seven-Year Land Acquisition Program, 1983 - 1986.
- chosen as a charter member of the Leadership Oklahoma program, sponsored by the Academy of State Goals, 1988 (the only Indian tribal leader chose for this group).
- appointed to the statewide Indian Economic Development Advisory Council, Oklahoma Department of Commerce, 1989.

It is a privilege and pleasure for me to appear before this Special Committee to identify and illustrate some of the problems that tribal leaders and tribal members have experienced with surface damages to tribal lands and acquiring additional tribal trust land. First, I would like to provide a brief background on these matters and follow up with the actual experiences of the Sac and Fox Nation.

The Federal Trust Responsibility and the Sac and Fox Nation.

The Sac and Fox Nation has entered into twenty-one (21) Treaties and Agreements with the United States of America. This method of dealings between the two parties has resulted in a government-to-government relationship, which established the federal government's obligation to honor this "trust relationship" and to fulfill its commitments to the Indians, and has become known as the United States' "trust responsibility" or "trust obligation."

A duty arises upon the federal government to protect Indian land; to protect the land's water supply, to protect the land from destruction or waste, to advance Indian interests where Indian property is concerned, and to exercise the highest degree of diligence and skill with regard to Tribal and Indian natural resources. The innumerable court decisions, federal laws, and regulations, and policies serve as monuments to these national ideals.

The Congressional responsibility to honor these federal commitments has been primarily delegated to the Bureau of Indians in the Department of the Interior. Therefore, federal administrative agencies are required to faithfully execute the trust duties which Congress has created and maintained.

One great issue to our people today is the management, or mismanagement, of Sac and Fox natural resources by the Bureau of Indian Affairs.

Federal Protection of Tribal Land From Surface Damages

Pursuant to the Treaty with the Sac and Fox Nation, which was ratified by Congress on July 25, 1868, a new reservation for the Sac and Foxes was created in what is now the east-central region of the State of Oklahoma. Comprised of a 750-square mile area, the Sac and Fox Reservation was opened up to non-Indian settlement by the Agreement of February 13, 1891.

Prior to the 1891 Agreement, all of the land within the reservation was held in common ownership by the members of the Sac and Fox Nation. Thereafter, each tribal member was allowed to select a 160-acre tract of land on the reservation as his own individual property. In addition, a small parcel of land was retained in tribal ownership. Today this parcel of land comprises 981.5 acres in east-central Lincoln County, Oklahoma. Over 17,000 acres of; individually owned allotted lands remain within the exterior boundaries of the Sac and Fox Reservation.

In the 1920's - 1930's exploration for oil and gas began on tribal land. The Bureau of Indian Affairs, the Bureau of Land Management and Minerals Management Services have shared responsibility for the management and oversight of these mineral operation activities on both tribal lands and individual Sac and Fox allotments.

In 1981, after voiced concerns of serious problems with oil and gas activities on tribal land became a wide-spread belief, the Sac and Fox General Council (the voting membership of the Tribe) authorized a tribal investigation into mineral operations on tribal lands. While the findings and results of this investigation remain today as serious issues faced by tribal leaders, I will not elaborate on these since my fellow tribal representatives are prepared to present those matters to you.

In 1982, I began employment with the Sac and Fox Nation and assisted the Tribal Attorney and the General Manager in the oil and gas investigation mentioned above. Tribal members were alarmed at the frequency and seriousness of oil spills and saltwater leaks occurring on tribal property. Compounding the problem was the feeling that BIA officials paid too little attention to the Sac and Fox people's precious land —— and especially where oil and gas

operations were involved.

I was assigned as the designated Sac and Fox tribal representative to work with BIA, BLM, and MMS officials in addressing and resolving situations where surface damages to tribal lands occurred as a result of mineral operations on tribal land.

I have prepared and attached a Summary Report of Incidents, oil and saltwater leaks and spills, which have occurred on tribal lands since 1982. The Summary Report cites the approximate date of occurrence, the Tribal officials' assessment of the extent of damage, the BIA's appraisal (when conducted) of damages incurred and the current status of the claims for damages. The attached supporting documentation portrays the BIA administrative indifference to the protection, value, or restoration of Sac and Fox tribal lands.

The Summary Report clearly illustrates what was happening: an excessive number of surface damage incidents were occurring in relation to the small size of the tribal land base affected and, more importantly, to the incredibly low appraisals of the extent of damage/injury to the land by the BIA officials.

The Report shows a systematic routine of providing tribal leaders with a BIA appraisal amounting to a mere fraction of the amount determined by tribal representatives and the operators to be fair and justifiable. The BIA appraisals, in almost every instance, was a fraction of the dollar figure the oil companies and pipeline companies were willing and prepared to pay! For example, on one occasion, the Shawnee Agency BIA Superintendent advised Sac and Fox leaders not to accept less that $100 as full settlement for an oil spill; the tribal leaders accepted a $1,000.00 settlement offer from the oil company. On another occasion, the BIA Superintendent advised us that an amount less than $200.00 should not be accepted; in fact, $1,435.00 was received.

It gets worse. This past year, BIA officials were asked by tribal leaders to perform an appraisal of the value of damages inflicted to tribal lands. The BIA appraisal figure was calculated to be $100.00, with costs of restoration of the affected tribal areas to be borne by the oil company. The oil company offered, and tribal leaders accepted, $6,937.50 as settlement for damages resulting from an oil spill, chemical spill from a battery storage, and a spill from chemicals in electric transformers.

It is clearly apparent that there was an established pattern of determining the extent of damages when a spill occurred: with tribal representatives and the mineral operators on the one hand, and BIA representatives on the other. For the most part, oil company officials responded in an environmentally responsible fashion when an oil or saltwater spill occurred. The tribal experience over this period of time shows that it was likely, and quite probable, that appraisals were performed by BIA officials while sitting behind a desk located miles from the actual spill site. To believe otherwise would be to believe that BIA officials were intentionally negligent in protecting tribal resources. Tribal

representatives and oil company officials were always inspecting and re-inspecting the damage sites. BIA personnel and assistance are slow in coming, if they come at all. By comparison, the Tulsa District office of Bureau of Land Management, for the most part, took reasonable prompt initial and follow-up action regarding the spill sites since 1982.

FEDERAL LAND ACQUISITION AND THE SAC AND FOX NATION

Real estate holdings are the single most important economic resource of an American Indian tribe. The Indian tribe's jurisdiction, the territorial area over which it provides necessary public services, is an invaluable asset. Without a land base, an Indian tribal government's ability to address issues of chronic poverty, poor health, drastically high unemployment, and poor education is severely inhibited. By analogy, one might say that the City of Miami, Florida, because of its larger land base, is able to provide a better environment for its people than say, the city of Del City, Oklahoma.

Tribal property is a form of "ownership in common, held in common for the benefit of all tribal members. Tribes may acquire land by purchase in their own names as a consequence of their general contractual capacity. Such lands as acquired are subject to federal restraints against alienation and are therefore entitled to federal trust protection, per Title 25, United States Code, Section 177. This statute authorized the expansion of the property holdings of a Tribe.

Section 465 of Title 25 of the United States Code provides, in part:

"The Secretary of the Interior is authorized, in his discretion, to acquire . . . any interest rest in lands, . . .

> Title . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

Since 1934 it has been the federal policy to assist Indians and Tribes in acquiring lands. This was an effort to forever denounce the disastrous allotment policy of the late nineteenth century. In addition to the statute listed above, there are numerous general and specific federal laws dealing with the enlargement of the Indian land base.—

On August 28, 1982, the Sac and Fox General Council authorized a Seven-year Land Acquisition Program. Beginning in FY 1983, $50,000 of tribal funds has been set aside each year for these purposes. Tribal members endorsed this program as a method of maintaining, and hopefully, increasing the Indian land base by purchase. Individual ownership of federal trust lands has dwindled throughout this century.

It was the expressed desire of the Sac and Fox General Council to have all land acquisitions placed in a federal trust status. In this way, no one could ever take Sac and Fox land without an Act of Congress. The BIA policies

on acquiring trust land, and the selling of trust lands are attached.

Armed with the money to buy land in order to increase the tribal land base, the task of acquiring additional lands for the Sac and Fox began. In mid 1983, the Tribe purchased eighty (80) acres of non-Indian owned fee land that adjoined the tribal lands in Lincoln County. Subject to the provisions of 25 U.S.C. Section 465, the property was taken in trust for the Sac and Fox Nation. Relatively little time passed between the time the Tribe acquired the property and the date the Bureau of Indian Affairs actually approved the realty acquisition to be placed in trust status. More importantly, the Field Solicitor's Opinion, dated June 6, 1983, (attached) required the non-Indian seller to provide a deed directly transferring the property to the United States as trustee for the Sac and Fox Tribe of Indians of Oklahoma.

A second acquisition in 1983 comprised of five (5) acres also was acquired in trust in a relatively short time frame. This parcel, owned by the federal government in trust for an individual Sac and Fox member was accepted by the BIA in trust for the Tribe in three months. In 1985, the BIA took only two (2) weeks to transfer 11.25 acres from a tribal member to the Tribe after purchase.

Thereafter, all tribal efforts to place land acquisitions in trust status by the Bureau of Indian Affairs have thus far been unsuccessful.

In March of 1986, Sac and Fox tribal leaders were invited to purchase a 7.5 acre tract parcel of land from a Sac and Fox elder. Both the Business Committee, on behalf of the Tribe as buyer, and the Indian seller agreed to allow the BIA appraisal amount to be deemed as the bargained-for price of the property. In May, the BIA representative advised both the buyer and seller that the appraisal figure for the 7.5 acre tract was $48,750.00. Feeling that this figure was too low, the tribal leaders offered $60,750.00 to the tribal member as a fair price for the property. The purchase money was remitted to the BIA in favor of the Indian seller's account, and the seller executed the Deed in the name of the United States in trust for the Sac and Fox Nation. All of this was performed by the parties at the request and instruction of BIA officials at the Shawnee Agency.

On July 2, 1986, tribal leaders were advised they were unable to obtain a written appraisal report on the subject property because the appraiser had been appointed to a position at another agency. The Shawnee Agency Superintendent requested that a BIA appraiser from Washington, D.C. perform the written appraisal of the property located in Shawnee, Oklahoma.

On August 8, 1986, Sac and Fox leaders were advised of the results of the second BIA appraisal of the property. BIA officials termed the original appraisal as a "preliminary value," and not an appraisal. The second appraisal valued the property at $92,750.00 for the 7.5 acres; this new figure was almost twice the original BIA appraisal figure.

Feeling that the second appraisal was unrealistic and contained an artificially-inflated figure in light of the declining property values after the Oklahoma oil and gas decline of 1982, the tribal leaders authorized an independent appraisal of the property. The independent appraisal, paid for by

the Tribe, derived a valuation of $75,000 for the property.

BIA officials reviewed the independent appraisal and, , in April of 1987, the BIA review was completed and the independent appraisal was disregarded as not meeting BIA standards for appraisal reports.

Thereafter, Sac and Fox tribal leaders rescinded earlier action to purchase the property because the BIA officials advised the Indian seller to not accept an amount less than the second BIA appraisal figure.

Even today, more than three years later, the land is still for sale but has not been sold. Since 1980, local land prices have dramatically dropped, as well as the number of properties sold. There has been nominal improvement, in the local economy where the property is located, no new residential or commercial development has occurred near the subject property in over five years. Speculation still exists whether the economy in this region of the state has bottomed-out or not.

The Indian buyer and the Indian seller both agree that the BIA second appraisal overstates the value of the property, to the tremendous detriment of the individual Indian seller and his family. The seller wants to sell to the Tribe, and the Tribe wants to avoid individual trust allotments from being acquired by non-Indians. This acquisition by the Tribe for a fair and reasonable price would serve the federal, tribal, and individual member purposes by maintaining the Tribe's precious jurisdictional land base. Today, the tribal member's 7.5 acres is not producing any income to him and his family.

The Sac and Fox Nation has acquired two additional parcels of land since 1986, comprised of 4.21 acres and 1.21 acres respectively, and the process of having these properties placed in trust status is taking an unreasonably long length of time. Copies of documents of correspondence dealing with the 1.21 acre tract-located in Shawnee, Oklahoma are attached for your review. The deed transferring the 1.21 tract of land conveyed the property from the non-Indian seller to the united States of American in trust for the Sac and Fox Nation. This is the same procedure followed in which the Sac and Fox acquired the 80-acre tract in 1983. However, in January of this year, the BIA Regional Solicitor for the Tulsa office rejected this method of documentation for the acquisition of the 1.21-acre tract. The Solicitor advised that the non-Indian seller should provide a deed transferring the property to the Sac and Fox Nation; the Sac and Fox Nation should then provide a Deed transferring the property to the United States in trust for the Sac and Fox Nation. The remaining unanswered question is this: Why the change in documentation of transfer?

It is felt that, instead of actively assisting the Tribe in acquiring a greater land base, BIA officials, utilize discretionary administrative delays and obstacles in processing trust applications. Tribal leaders fear that an "unwritten policy" or "hidden agenda" exists at the local agency and Area Office levels of the Bureau of Indian Affairs. These undeclared announcements, if successful, will frustrate future trust land acquisitions.

Testimony of James L Welsh III, Director of Real Estate of the Sac and Fox Nation, Oklahoma, before the Special Investigative Committee of the Senate Select Committee on Indian Affairs.

Mr. Chairman:

The opportunity to be part of a changing management system from a government level to a tribal level has been a tremendous responsibility to say the least.

The learning process, the excitement and the venture into a direction of self-determination for the Tribe has been the desire of every Indian for a hundred years.

As Director of Real Estate, I am responsible for the planning and construction of a positive program to manage the Trust and Restricted lands under Tribal Jurisdiction which totals approximately 48,000 acres. My department is the Attorney-in-fact for Wills, Probate and Estate actions. I am also the Credit and Finance/Officer for the Tribe.

My fifteen years of Real Estate background to include international clients has allowed me the flexibility to perform a variety of tasks not found in the general field of Real Estate. I currently hold the designation of SREC (Society of Real Estate Investment Counselor) and will earn my MSA designation this year (Master Senior Appraiser). My Real Estate studies have been extensive in the proffession.

I have graduate level Certificates in Real Estate and Appraisals which includes European studies. In the past fifteen years, I have acquired, disposed and consulted on over $750,000,000.00 worth of properties for such clients as:

Bank of American	Prudential Life Insurance Co.
John Hancock	Richard C. Price Company's
Transamerica	Del Monte Corporation
Safeco	Best Western Hotels
Foreign Investment Groups	E&J Gallo Winery

I have authored information and Marketing books on such subjects as "The Economic Impact of Hispanics" and several Economic studies to Fortune 500 companies and major Private Investors. I might also add that I am a 3/4 Indian descendant of the Cherokee, Chickasaw and Choctaw Heritage.

I, as Director of Real Estate of this Tribe, bring to this position not only a strong belief in the "Sovereign Rights" of our Indian Heritage but the education, experience and Corporate training to recognize the gross mis-management of the Bureau of Indian Affairs and the Bureau of Land Management.

Since being in the corporate world of Real Estate, I have never experienced the level of mis-management as I have experienced in this changeover of the 638 program. Even the Bureau personnel who had the desire some years a go to assist and provide the proper management to the Indians, they themselves have been caught up in the lack of leadership, apathy and whims of upper level management.

We found a strong resentment of Bureau personnel awaiting us at the front door of 638, of which, we expected to find a high level of management and attitudes to assist us. Instead, we found confusion, resentment and a total "they wanted it" "they can have it" attitude. We have lost our lands thru fraudulent appraisals, our waters to improper Environmental Protection Management and the BIA's lack of direction and disregard of Land Management and Conservation practices.

I would now like to present specific examples of problems in several areas:

SF #237 Why was the warning regarding the waste water dumping ignored on SF-237 10/6/83 George Paddock Allotment (no response or investigation BIA/BLM)?

SF #1004 A well was drilled in 1980 on the Allotment, the owner had continuously contacted the BIA regarding the plugging and abandonment of this well since 1981. With notification and assistance from the Allottee, why did it take the BIA 6 years to restore this property? (Note) Property when inspected by the BIA in (December 1986), the well site could not be located. In January 1987 BIA could not find the bore site, so inspected what appeared to be the old location.

SF 133 Why didn't the BIA prevent the construction work that was conducted on this allotment prior to the Environmental Assessment Reports and Business Lease being approved? This ground is still not restored and we have no bond to cancel.

SF 358 Well was drilled in 1983, the reserve pit needed to be restored in April 1984. On February 25, 1988, the lessee filled in the reserve pit with a bulldozer. Why wasn't the bond cancelled? If so where is the money? Why wasn't the driller contacted for 4 years 1984-1988? Where is the release to the driller? If released why? Because restoration was not complete?

SF 266 In March 1987 the Principal Chief requested the BIA (Walker) to inspect oil spill damages. The Tribe received no response and assessed damages and collected monies later that year. Why no response from BIA?

SF 135 Well was drilled in 1985, the BIA (Walker) received a Second Abandonment Request in 1987. There has been no follow-up on this request and inspection of well sites since 1987. Why not and where is the bond and why wasn't it cancelled?

SF 175 On October 29, 1981, an inspection was made for damages from a fire around an oil well and approximately 3 acres, further inspection revealed oil contamination draining into an existing draw from the pumping unit. On a routine inspection on July 21, 1982, this particular leak was found again flowing into an adjacent creek. Why wasn't the oil company assessed damages for contamination at the first siting and why did it take a year to follow-up on this contamination.

SF 172 A well was drilled 1981, the owner of the property notified the BIA (Walker) 1982, the reserve pit had not been filled and the surface restored. All obligations regarding this restoration of abandonment have not been completed to the present time. Why not after 7 years and why wasn't the bond cancelled? Where is the release?

SF 203 On May 20, 1982, serious surface damages and pollution problems were found to exist. Oil & salt water was allowed to flow from a break to a creek 400 ft. away, vegetation was filled as a result. June 16, 1982, BIA (Walker) informed driller after 4 major discrepancies were found there would be an inspection witnin 30 days. The same oil spills occurred in 1984 and in 1987 the operation is in noncompliance after the 1987 inspection. Whey was there no 30 day inspection and if so why didn't you know there was an abandoned well on this property for 15 years.

F&G F&G Leases #14-20-0108-5214, 5215, 5216, 5218 & 5219 were submitted to the BIA. These leases were returned to the Tribe for the following reasons:

1. Appraisal Reports
2. Title Status Report
3. Receipt of filing fee

Since the BIA had approved all bids on these leases and the above documents had to have been completed prior to accepting the bids in 1988, whey did the BIA not approve the submission of these leases. These leases are still not approved.

SF #50 Abandonment notice received by BIA June, 1986, well has been plugged. No restoration has been completed or followed up on since plugging. Why not?

SF #45 Report of Abandonment received by BIA on May 22, 1986, to present day no restoration. Where is the bond? And why is it taking 3 years to act on this?

SF #317 This property had been used as a dump site for 6 years. The BIA (Walker) responds, it is the owners responsibility to resolve this matter. Why didn't the BIA provide the management and trust responsibilities for this Allottee? Also the current appraisal shows no indication of the trash site. The BIA's Appraiser has not been to this site while providing the appraisal.

SF #21 & #259 In August, 1988, an appraisal was issued by the BIA which was reviewed by the Area Appraisal as satisfactory. The Appraisal is for a transmission right of way Western Farmers Electric Co-op. The BIA did not request an appraisal for the landowners instead they used the Western Farmers Appraisal. Is this your policy to providing highest and best use for the Allottees and competitiveness bidding?

We as tribal members and employees would like to request from your Committee that they take a hard look at the management attitudes and policies that were not good for tribal communication and management up to this current time, but in fact have gotten worse with this changeover. We as proud members of the Sac and Nation Administration will not only lead and set the example for other Tribes to follow, but will in fact weed thru this turmoil and gross mis-management of the BIA to perhaps make the 638 Programs have an easier transition to our brothers. Thank you for this opportunity to be a part of the hearings and what I know will be a better understanding between us and the BIA through the guidance of your Committee.

Mr. Chairman, this concludes my statement and I welcome the opportunity to respond to any questions which the members of the Committee may have.